STATE OF WISCONSIN

IN SUPREME COURT

Case No. 00-0971-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

BRADLEY J. VORBURGER,

Defendant-Appellant.

REVIEW OF DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE STEVEN D. EBERT, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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ISSUES

1. Under the totality of the circumstances, did the detention of the suspects escalate into an arrest that was not supported by probable cause, thereby rendering invalid the consent Amerie Becker gave to search her apartment?

Trial court answered: No.

Court of appeals answered: Yes.

2. Did Amerie Becker voluntarily consent to the search of the apartment she shared with Bradley J. Vorburger?

Trial court answered: Yes.

Court of appeals answered: The court did not reach this issue since it found that the consent was invalid because it was given while Becker was illegally arrested.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The fact that this court granted the petition for review demonstrates that the case merits oral argument and publication of the opinion.

STATEMENT OF THE CASE

A complaint issued July 10, 1997, charged that Bradley J. Vorburger had committed four crimes on or about July 2-3, 1997: possession of more than 15 grams but not more than 40 grams of cocaine with intent to deliver, as party to a crime, in violation of Wis. Stat. § 961.41(1m)(cm)3. and 939.05; possession of psilocin, as party to a crime, in violation of Wis. Stat. § 961.41(3g)(d) and 939.05; and two counts of possession of tetrahydrocannabinols (THC), as party to a crime, in violation of Wis. Stat. § 961.41(3g)(e) and 939.05 (2:3-4, 10). Also charged in the complaint with committing crimes on or about July 2-3, 1997, were Amerie Becker, Corin J. Cramer and Peter J. Kokoros (2:1-2).

At the conclusion of a joint preliminary hearing on August 21, 1997, Vorburger and Becker were bound over for trial (55:1, 26).

In an information filed on August 22, 1997, that also charged Becker, Cramer and Kokoros with crimes,

Vorburger was charged with committing five crimes on or about July 2-3, 1997 (7:1-4). In counts five, seven, eight and nine, Vorburger was charged with the same crimes with which he was charged in the complaint, except that the charge of possessing cocaine with intent to deliver additionally alleged that the crime was committed within 1000 feet of a public school (7:3-4). The information also charged Vorburger and Becker, as parties to the crime, with maintaining a place used for keeping controlled substances in violation of Wis. Stat. § 961.42 and 939.05 (7:3).

Vorburger filed motions to suppress evidence on the grounds that he and Becker had been illegally detained and arrested, that their consents to search were obtained as a result of the illegal seizure, and that the consents were involuntary (15:1-2; 22:1-3).

A suppression hearing was held on April 2 and 3, 1998 (58:1; 59:1).

On November 5, 1998, the circuit court issued a decision and order denying the motions to suppress (31:1-14; Pet-Ap. 115-28). The court decided that Becker voluntarily consented to the search of her apartment and that Vorburger and Becker had been detained legally (31:7, 10-14; Pet-Ap. 121, 124-28).

On June 28, 1999, pursuant to a plea agreement, Vorburger pleaded no contest to an amended count five in the information (64:2, 6). The state amended the count to charge possession of more than 5 grams but less than 15 grams of cocaine with intent to deliver and dismissed the other charges against Vorburger in exchange for his plea (64:3-4). The dismissed charges could be read in for disposition (64:5). The court accepted Vorburger's plea and found him guilty of the charge in the amended count five (64:9).

On October 4, 1999, the court sentenced Vorburger to thirty months in prison (65:37).

Vorburger appealed from the judgment of conviction and the order denying his suppression motion (53:1).

The court of appeals reversed the judgment of conviction after concluding that Vorburger and Becker had been arrested without probable cause and that their consents to search Vorburger's car and their apartment were the fruit of the illegal arrest. *State v. Vorburger*, 2001 WI App 43, ¶¶ 18, 22, 241 Wis. 2d 481, 624 N.W.2d 398 (Pet-Ap. 110-11). The court of appeals remanded the case to the circuit court with directions to grant Vorburger's motion to suppress. *Vorburger*, 241 Wis. 2d 481, ¶ 29 (Pet-Ap. 114).

STATEMENT OF FACTS

The following facts relate to the validity of the consent Becker gave for the search of the apartment she shared with Vorburger because the issues on this review are concerned with the validity of that consent.

At 2:30 p.m. on July 2, 1997, Corin Cramer checked into room 230 at the Motel 6 in Madison (58:91; 59:109). Kathryn Strickland, the motel clerk who checked in Cramer, said he arrived in a car with license number RZY 670; and that was the number Cramer identified in his registration (58:57; 59:109). According to Strickland, one or two other people were in the car with Cramer when he arrived (58:94; 59:109). After Cramer registered, Strickland saw him get back into the car and saw the car go toward the area of the motel where room 230 was located (59:109). No one Strickland described in the car matched Vorburger's description (59:153).

At about 4:00 or 4:30 p.m. Jose Aguirre, the manager of the Motel 6, went to room 230 to inspect it to determine whether it had been properly cleaned (58:38; 59:107). Aguirre did not know that the room had been rented to Cramer (58:42). When he entered the room, Aguirre smelled something funny that he suspected was marijuana

(58:38; 59:107). He looked inside a thermal-type bag and saw what he believed to be marijuana in a black garbage-type bag (58:41-42; 59:107). Aguirre put a sample of the substance in a plastic bag and returned to the office (58:42-43; 59:107-08).

Aguirre or an employee called the police at about 4:30 p.m. and reported that the motel had a room with suspected marijuana (58:44-45).

Dane County Deputy Sheriff Jeffrey Thiel was dispatched to the Motel 6 at about 4:30; and he arrived at the motel at about 4:45 p.m., when Deputy Lurquin also arrived (58:103, 104-05, 107-08).

Aguirre gave the suspected marijuana to Thiel, who was familiar with the physical appearance of marijuana (58:109, 138). Deputy Lurquin telephoned Sergeant Ritter, who said he would contact the Dane County Narcotics and Gangs Task Force (DCNGTF) to see if they could get a search warrant (58:110).

Thiel checked license number RZY 670, which Cramer had given when registering, and learned that the car was registered to Peter Kokoros (58:140-41).

Ritter called Randall Gaber, who was then a sergeant assigned as a supervisor on the DCNGTF (59:10, 12). Gaber sent uniformed officers to the motel and between 5 and 5:15 p.m. assigned Detective Alix Olson to obtain a search warrant (59:12-13, 52).

At about 5:05 p.m., Thiel and Lurquin went to the hallway outside room 230 to hold the room until a search warrant was prepared (58:113, 115, 143). At about 5:45 p.m. Thiel saw Kokoros drive his car with license number RZY 670 into the motel parking lot, and shortly thereafter Thiel saw Kokoros approach room 230 with a key as though he was about to enter the room (58:144-47, 155). When Thiel asked him what he was doing at the room, Kokoros said he just wanted to use the bathroom (58:156-

57). After Thiel talked to Kokoros about fifteen minutes, Office Montie arrived and asked Kokoros to go outside to talk to him (58:162-64, 207-09).

After Montie left with Kokoros, Thiel tested the suspected marijuana; and the test was positive for the presence of THC (58:163-65). Thiel shared the information about the test result with other officers, including Olson (58:165).

Kokoros told Montie that he had checked into room 215 at the Motel 6 the day before, on July 1, and then had checked out at about 10 a.m. on July 2 (58:210). Kokoros explained that he had the key to room 230 because earlier in the day Cramer had been in the car when Kokoros's friend, Paul Herberger, had used the car to bring Cramer to Herberger's residence, where Kokoros was (58:210-11). Kokoros said that, while returning to LaCrosse, he had to go to the bathroom; saw the room key in his car; recalled that Cramer had mentioned room 230 at Motel 6; and Kokoros stopped at the room to use the bathroom (58:217).

After arriving at the motel at about 6 p.m., Officer Kevin Linsmeier learned from Gaber that Kokoros had rented room 215 the night before (58:280). Linsmeier entered room 215 using a key and found marijuana seeds and remnants in the room (58:281).

From talking with Kokoros and from checking records, Montie learned that Cramer was driving a Grand Prix with license number SBW 791 (58:223-24).

At about 9:20 p.m., Montie heard Officer Compton advise that the suspect vehicle and another car had entered the motel parking lot (58:229). Kokoros pointed out Cramer, who Montie learned from the motel clerk had entered the office to ask for a key because he (Cramer) said he had left his key in his room (58:229-32). Montie saw Cramer leave the office and drive in his car, followed

by a white Buick Riviera, to the motel wing where room 230 was (58:230).

After directing Olson to get the search warrant, Gaber had gone to the motel at about 6 p.m. (59:13, 15). From 6 p.m. to 9:20 p.m., Gaber directed officers to perform assignments as part of the investigation, interviewed Kokoros and performed other duties (59:15).

Gaber received radio communication from Officer Compton that he had observed two vehicles, including the Grand Prix, drive toward the motel room; and he had seen the cars park outside the entrance leading to room 230 and Cramer and others had walked into the motel (58:166; 59:93).

Gaber waited in room 229 with Deputy Thiel and Officers Linsmeier, Paulson and Linda Kosovac (59:53). At 9:20 p.m., Gaber saw three people travelling as a group come down the hallway toward room 230 (59:18, 85-86). Gaber heard someone insert a key into the lock for room 230 (59:19). Gaber and the other officers came out of room 229, and Gaber saw that Cramer had the key in the lock (59:19). The two persons with Cramer were Vorburger and Becker (59:20).

When coming out of room 229, at least three of the officers were in uniform and in loud voices the police identified themselves as police officers (59:21, 54-55). Gaber said he put Cramer in handcuffs for officer safety (59:21). Kosovac and Thiel told Vorburger to put his hands behind his back, and he was handcuffed (59:233). Vorburger was patted down and no weapons were found (59:233).

Linsmeier placed handcuffs on Becker and told her the handcuffs were for his and her safety (58:290). He patted her down for weapons and did not find anything (58:292). Linsmeier told Becker the police were conducting an investigation and she was being detained

(58:290). Linsmeier recalled telling Becker that she was not under arrest (58:290-91).

Gaber testified that, after Vorburger, Becker and Cramer were put in handcuffs, they were told they were not under arrest, they were being detained for a drug investigation (59:21-22, 76-77).

Gaber said that no officer drew his or her gun (59:31).

Linsmeier said that Becker appeared upset and that she was crying (58:292, 305). Becker told Linsmeier that she had come to the room because she had to go to the bathroom (58:284). Because Becker said she had to go to the bathroom, Linsmeier called for a female officer, Kosovac (58:291-92).

Kosovac said she told Becker that she would accompany her to the bathroom and stay with her in the bathroom, but Becker said she did not want to go to the bathroom then (59:193). Becker testified that she declined the offer to go to the bathroom because Kosovac said she could not remove the handcuffs, and she did not feel comfortable having someone assist her in the bathroom since she had recently had surgery (59:249). Kosovac denied that she told Becker that Becker would have to keep the handcuffs on while going to the bathroom (59:225). Kosovac said the handcuffs always come off for female prisoners to go to the bathroom unless they are combative or violent (59:225).

After Becker had been handcuffed, the police got a chair for her; but Linsmeier recalled that Becker preferred not to sit down (58:306). Vorburger, Becker and Cramer and the police waited in the hallway until the search warrant arrived (58:307). Gaber recalled that five to eight police officers were in the hallway during the course of the evening (59:61, 65).

After gathering information, Olson finished drafting the search warrant affidavit at about 8:45 p.m., had it reviewed over the phone by an assistant district attorney and took it to Judge Angela Bartell's home to be signed (59:113). Olson said that Judge Bartell signed the search warrant at 9:34 p.m. (59:113). Olson had been working on preparing the search warrant from the time Gaber had called her until Judge Bartell signed the warrant (59:113-14).

Olson went straight from Judge Bartell to the motel, where she arrived at 10:05 p.m. (59:115). Olson read the search warrant to Cramer at 10:15 p.m. (59:117).

At 10:17 p.m., Olson entered room 230 along with Gaber, Linsmeier, Paulson and Officer Gloede (59:117-18). In a bag, the police found a large amount of marijuana and a digital scale (59:118). Marijuana was also found in a box under the night stand (59:119). Olson turned the room over to Paulson and Linsmeier for evidence collection, and Olson left the room to talk to Gaber before attempting to interview Kokoros, Vorburger and Cramer (59:119, 120, 123, 132). When Olson was in room 230, she did not see any indication that Becker or Vorburger had been in the room (59:168, 173).

A little after 10:30 p.m., Kosovac was asked by Olson and Gaber to speak with Becker (59:194). Kosovac took Becker to room 229, removed her handcuffs and told her she could use the bathroom (59:194). When Becker used the bathroom, the bathroom door was open (59:226). The door to room 229 was left ajar two or three inches for privacy (59:226). When Becker said she was thirsty, Kosovac removed the plastic from one of the cups in the room and gave the cup to Becker for a drink (59:194).

At 10:39 p.m., Kosovac read the *Miranda* rights to Becker, who said she was willing to answer questions (59:195-96, 244). Kosovac told Becker the police were there on a drug investigation, and she asked Becker to tell her about the day's activities (59:197). After Becker

explained that she and Vorburger shared an apartment and described what she and Vorburger had done during the day, including sharing a blunt, Kosovac asked Becker if she had anything on her or in her purse (59:197-201). Becker gave Kosovac consent to search her purse, and Becker said the only thing she would have at her apartment would be enough marijuana for a joint or two and some rolling papers (59:201). Kosovac told Becker she would like to confiscate the small amount of marijuana at Becker's apartment and asked Becker if they could go to Becker's house to collect those items and to search for any other items in the house (59:203). According to Kosovac, Becker said, "'Sure, no problem'" (59:203).

Kosovac testified that at 11:15 p.m. she contacted Olson and Gaber and then returned to Becker and again asked if it was okay to search the apartment (59:203-04). According to Kosovac, Becker said they could search her apartment (59:204). Kosovac said Becker was concerned that the police would trash her apartment in the search, and Kosovac assured Becker that the police would be respectful of her personal items (59:204). Kosovac said she requested to search the entire apartment and that the consent was not limited to a search for marijuana (59:204-05).

Kosovac and two other officers went with Becker to Becker's apartment (59:206). At the apartment, Kosovac asked a third time if it was okay to search the apartment (59:208). According to Kosovac, Becker said Kosovac could look anywhere in the apartment where she wanted (59:208). During the search, the police found marijuana, an ounce or so of powder cocaine, about 4.4 grams of psilocybin mushrooms, a small postal scale, roaches left from a marijuana cigarette, and about $2,000 in cash (59:139-40, 210).

Gaber said that Becker was never taken into physical custody that evening (59:63). Becker admitted that she was not taken to jail that evening (59:294).

After the suppression hearing, the trial court concluded that Becker validly consented to the search of the apartment she shared with Vorburger. The court found that Becker voluntarily consented to the search (31:7; Pet-Ap. 121). The court also found that Becker had not been arrested and she was legally detained at the time she gave the consent (31:8-14; Pet-Ap. 122-28).

The court of appeals disagreed with the trial court. Reasoning that the case involved many circumstances associated with a formal arrest and that Vorburger and Becker had little if any indication of how long they would be detained before they could go free, the court concluded that a reasonable person in their positions would have considered himself or herself to be in custody. *Vorburger*, 241 Wis. 2d 481, ¶ 18 (Pet-Ap.109-10). The court found that the custody was illegal because the police did not have probable cause to arrest Becker; and, because Becker was in custody illegally when she consented to the search of the apartment, the consent was invalid. *Vorburger*, 241 Wis. 2d 481, ¶¶ 21-22, 29 (Pet-Ap. 111, 113-14).

Additional facts will be set forth in the brief when they become relevant to the discussion.

ARGUMENT

I. SUMMARY OF ARGUMENT

Although Vorburger is the party to this appeal, the issues in this court concern the validity of Becker's consent to search the apartment she shared with Vorburger.

The court of appeals concluded that Becker's consent was invalid because it was given while she was arrested without probable cause. *Vorburger*, 241 Wis. 2d 481, ¶¶ 18, 21-22, 29 (Pet-Ap. 109-11, 113-14).

In this brief, the state will argue that Becker was validly detained before, during and after the execution of the search warrant while the police conducted an investigation concerning the drugs reported to be in room 230 of the Motel 6. The state will contend that neither the circumstances of the detention nor its length turned the detention into an arrest. Because the detention was supported by reasonable suspicion, the detention was valid. Because the detention was valid, Becker's consent to search given during the detention was valid.

The state will also argue that Becker's consent to search was given voluntarily. Vorburger argued in the court of appeals that the consent was not given voluntarily. Because the court of appeals reversed the conviction on the ground that Becker and Vorburger were illegally arrested when consent was given, the court did not reach the issue of whether the consent was given voluntarily. Because the state contends that the detention of Becker was valid, it will be necessary to reach the voluntariness issue in this court.

In the petition for review, the state said two issues in this court would be whether the police could detain non-residents of room 230 while waiting for the search warrant to arrive and whether they could detain non-residents while the search warrant was being executed.

In responding to the petition for review, Vorburger stated that this case does not present an issue of the lawfulness of detaining him and Becker pending the obtaining and the execution of the search warrant. Response in Opposition to Petition for Review (Response) at 3. Vorburger states that the initial stop of him and Becker has never been contested. Response at 5. Vorburger pointed out that on appeal he only argued that the continued detention of Becker and him, even after the execution of the search warrant revealed no evidence connecting them to the motel room, transformed the *Terry* stop into a full-blown arrest. Response at 4, 5. Vorburger claims that the court of appeals agreed with him that the

detention amounted to an arrest under the totality of the circumstances. Response at 4, 5.

In light of Vorburger's response to the petition for review, the issues in this court now are limited to the questions of whether Becker's seizure constituted a detention or an arrest when she consented to the search of her apartment and whether the consent was given voluntarily.

II. BECKER WAS LEGALLY DETAINED WHEN SHE CONSENTED TO THE SEARCH OF THE APARTMENT SHE SHARED WITH VORBURGER.

A. The standard of review applicable to the issue of detention.

The standard of review applicable to Fourth Amendment challenges was stated in *State v. Griffith*, 2000 WI 72, ¶ 23, 236 Wis. 2d 48, 613 N.W.2d 72:

> When a Fourth Amendment challenge is raised at the trial court level, the trial court considers the evidence, makes findings of evidentiary or historical fact, and then resolves the issue by applying constitutional principles to those historical facts. On review, this court gives deference to the trial court's findings of evidentiary or historical fact, but determines the question of constitutional fact independently.

(Citations omitted.)

Under this standard, this court independently decides whether Becker was under arrest when she consented to the search of her apartment. No deference is accorded to the court of appeals' finding that Becker had been arrested by the time she gave the consent.

B. An objective test determines whether a person has been arrested.

In the Response in Opposition to the Petition for Review at 5, Vorburger pointed out that he has never contested the lawfulness of the initial stop of Becker and him. He contends that the circumstances and the length of the detention transformed the lawful detention into an unlawful arrest without probable cause. Response at 5. Vorburger notes that the court of appeals found that under the totality of the circumstances he and Becker were arrested by the time they consented to searches. *Vorburger*, 241 Wis. 2d 481, ¶ 18; Pet-Ap. 109-10.

Both an arrest and an investigative detention are seizures under the Fourth Amendment. *Vorburger*, 241 Wis. 2d 481, ¶ 11; Pet-Ap. 106; and *United States v. Weaver*, 8 F.3d 1240, 1242-43 (7th Cir. 1993). The state and Vorburger agree that Becker had been seized at the time she consented to the search of her apartment. The question for this court to consider is whether Becker's seizure continued to qualify as a lawful investigative detention or whether at some point it escalated into an unlawful arrest.

The test for determining whether Becker was under arrest when she consented to the search is an objective one. The test is whether a reasonable person in Becker's position would believe that the degree of restraint was similar to that of a formal arrest. *State v. Swanson*, 164 Wis. 2d 437, 444, 475 N.W.2d 148 (1991). When adopting the objective test in *Swanson*, this court noted that the Fifth Circuit Court of Appeals in *United States v. Corral-Franco*, 848 F.2d 536, 541 (5th Cir. 1988), had already adopted an objective test to determine whether an arrest had taken place under the Fourth Amendment. *Swanson*, 164 Wis. 2d at 446 n.5. In *Corral-Franco*, 848 F.2d at 540, the court explained that the reasonable person in the objective test is an innocent person, that is, the reasonable person "is one 'neither guilty of criminal conduct and thus overly apprehensive nor insensitive to

the seriousness of the circumstances.'" *See also* 3 Wayne R. Lafave, *Search and Seizure* § 5.1(a), at 3-4 (3d ed. 1996) (citing *Corral-Franco* for the proposition that the reasonable person in the objective test is an innocent person).

The circumstances of the situation, including what has been communicated by the police officers in their words or actions, are controlling under the objective test. *Swanson*, 164 Wis. 2d at 447; and *United States v. Trueber*, 238 F.3d 79, 92 (1st Cir. 2001) (officers' intentions relevant only to the extent they are communicated to the defendant). A reasonable person is not under arrest when the implication of the actions of the police is that the person will be free to leave if the ongoing investigation fails to show that the person has committed a crime. *Swanson*, 164 Wis. 2d at 448; *State v. Quartana*, 213 Wis. 2d 440, 450-51, 570 N.W.2d 618 (Ct. App. 1997); and *Wilson v. State*, 547 So. 2d 215, 217 (Fla. Dist. Ct. App. 1989).

There is no litmus-paper or bright line test for determining when a detention has escalated into an arrest. *Florida v. Royer*, 460 U.S. 491, 506 (1983); *Trueber*, 238 F.3d at 93; *United States v. Tilmon*, 19 F.3d 1221, 1224 (7th Cir. 1994); and *Weaver*, 8 F.3d at 1243. An investigative detention can transform into an arrest because it extends too long to be justified as a stop or because of the force used by the police. *United States v. Sharpe*, 470 U.S. 675, 685 (1985) (length of detention); *Weaver*, 8 F.3d at 1244 (force); and *United States v. McGrath*, 89 F. Supp. 2d 569, 577 (E.D. Pa. 2000) (stop can ripen into arrest through use of force).

There is no rigid time limitation on the length of an investigative detention. *Sharpe*, 470 U.S. at 685. A detention longer than a brief stop is sometimes permitted. In *Sharpe*, 470 U.S. at 685-86, the Court said it sought to make that point clear in *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981), when explaining:

> "If the purpose underlying a Terry stop--investigating possible criminal activity--is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams* [*v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)]."

(Brackets in original.)

In *Summers*, 452 U.S. at 705, the Court held that the occupants of a premises could be detained while a search warrant was executed. Because execution of a search warrant can take a long time, the Court in *Summers* approved a lengthy detention while the search was conducted. In his dissenting opinion, Justice Stewart noted that the detention could be for several hours. *Summers*, 452 U.S. at 711 (Stewart, J., dissenting).

The detention approved in *Summers* fits within the broader test stated in *Sharpe*, 470 U.S. at 686, that, in assessing whether a detention is too long to be justified as an investigative stop, it is appropriate to consider "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."

The Court also cautioned lower courts not to second-guess the police actions during the detention and said that the "'fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, itself, render the search unreasonable.'" *Sharpe*, 470 U.S. at 687. The Court said: "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *Sharpe*, 470 U.S. at 687.

Under *Sharpe*, then, an investigative detention is not too long if the police are diligently pursuing a means of investigation that is likely to dispel their suspicions quickly; and the force used by the police will not render the detention an arrest unless the police acted

unreasonably. As to the means used by the police, which includes the force, the courts are not to second-guess the police actions. The courts are not to consider whether, in the abstract, a less intrusive means was available to the police. The courts are only to determine whether the police acted unreasonably.

In *Royer*, 460 U.S. at 500, the Court said, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Later, in *Sharpe*, the Court did not use the "least intrusive means" principle." Professor LaFave suggests that the Court in *Sharpe* cautioned against unrealistic application of the "least intrusive means" principle from *Royer* when the Court in *Sharpe* warned against second-guessing the police and said that the question is simply whether the police acted reasonably. 4 Wayne R. LaFave, *Search and Seizure* § 9.2 (f), at 73 (3d ed. 1996).

In *Weaver*, 8 F.3d at 1244, the court explained that during an investigative stop the police "may use the forcible means necessary to effectuate that stop, provided their actions are reasonable under the circumstances."

The reasonableness standard for assessing the police conduct was reaffirmed in *Illinois v. McArthur*, 121 S. Ct. 946, 949 (2001), when the Court said that the central requirement of the Fourth Amendment is "one of reasonableness." The Court concluded that the restriction imposed on the resident in preventing him from entering his home unaccompanied by police until a search warrant arrived was reasonable, and hence lawful. *McArthur*, 121 S. Ct. at 950.

In this case, the investigative detention of Becker until after she consented to the search of her apartment was lawful because the police were executing a search warrant and they were diligently pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly. The means used by the police to

detain Becker were reasonable under the circumstances. Therefore, the investigative detention of Becker did not escalate into an arrest and she was lawfully seized when she consented to the search of her apartment.

C. Becker's detention was not so long as to escalate to an arrest.

As Vorburger notes in his Response in Opposition to the Petition for Review, he has not contested the lawfulness of the original detention of him and Becker, but he contends that the lawful detention was transformed into an unlawful arrest when he and Becker were held after the execution of the search warrant failed to reveal any evidence connecting them to room 230. Response at 4-5.

Contrary to Vorburger's claim, the detention of him and Becker was lawful even if their seizure continued after the execution of the search warrant. The decision in *United States v. Fountain*, 2 F.3d 656 (6th Cir. 1993), a case with facts similar to those in this case, demonstrates why the police were justified in continuing to detain Becker and Vorburger, even if the detention continued after the search warrant was executed.

Before discussing the *Fountain* case, it has to be pointed out that the record does not disclose when the police completed the execution of the search warrant for room 230. The police entered room 230 at 10:17 p.m. to start the search (59:117). After seeing marijuana in a bag and in a box, Olson left the room and turned the room over to Paulson and Linsmeier for evidence collection (59:118-19). After leaving the room, Olson talked to Gaber; and a little after 10:30 p.m. Gaber and Olson asked Kosovac to speak with Becker (59:119-20, 194). Kosovac read the *Miranda* rights to Becker at 10:39 p.m. after having taken her into room 230 and after Becker had gone to the bathroom (59:194-96, 244).

No one testified about the time that the search was completed. However, it is highly unlikely that the search had been completed by 10:39 p.m., which was only twenty-two minutes after the police entered the room. By 10:30 p.m. the marijuana had been found in a bag and in a cardboard box (59:118-19, 120, 194). That does not mean that the search ended at that point. A police search of a motel is more thorough than just glancing around the room to see what evidence is out in the open. For example, in *Richards v. Wisconsin*, 520 U.S. 385, 388-89 (1997), the Madison police found cocaine hidden in plastic bags above the hotel bathroom ceiling tiles. To complete a search of the ceiling tiles and everywhere that drugs could be hidden in a motel room would take longer than twenty-two minutes. Therefore, the police were probably still searching room 230 when Kosovac questioned Becker in the motel room. Nevertheless, even if the execution of the search warrant had been completed by the time Kosovac interviewed Becker, Becker was still subject to a lawful detention so that the consent to search that she gave Kosovac was valid.

In *Fountain*, 2 F.3d at 658-59, the police had a warrant to search Fountain's residence. Upon entering, the police found Carlton McEaddy in the residence with Fountain, Selma Hill and Gregory Jackson. McEaddy was not a resident of the premises. *Id.* at 659, 663. All were handcuffed and forced to lie on the floor while the police took thirty to sixty minutes to execute the search warrant. *Id.* at 659-60. After finding narcotics and firearms in the search, the police took each detainee into a separate room one at a time for a brief interview. After McEaddy, a paroled felon, admitted to having handled a firearm, he was taken to another room for a more thorough interview. After McEaddy was in the second room, his handcuffs were moved and he was given the *Miranda* warning. *Id.* He made more incriminating statements during the second interview. *Id.* at 660. McEaddy asked the court to suppress his statements because they were given during an unreasonably prolonged detention and illegal arrest in violation of the Fourth Amendment. *Id.*

The court of appeals concluded that McEaddy was legally detained during and after the execution of the search warrant. *Fountain*, 2 F.3d at 660-66. The court relied on *Michigan v. Summers* in holding that it was lawful to detain McEaddy during the execution of the search warrant. McEaddy argued, as does Vorburger in this case, that the detention after the execution of the search warrant constituted an arrest without probable cause. The court of appeals agreed with the trial court that the continued detention of McEaddy was supported by reasonable suspicion. *Id.* at 665-66. The court said in *Fountain*, 2 F.3d at 666:

> Once the search of the premises was completed and resulted in the discovery of drugs and firearms, the agents had reasonable suspicion to focus on any occupant who was present in the home voluntarily or purposefully. . . .
>
> We believe that under the facts of this case, McEaddy's continued detention was reasonable to vindicate the agents' suspicions regarding McEaddy's possible connection to the contraband, or to eliminate those suspicions, by giving McEaddy an opportunity to explain the extent of his involvement.

In this case, although Vorburger and Becker were not in room 230 when they were initially detained by the police, they were about to enter room 230 with Cramer. The police had seen Vorburger and Becker follow Cramer into the parking lot, to the entrance to the motel and to the door to room 230 were Cramer had the key in the door when the police detained them. Under these circumstances, after finding the marijuana in room 230, the police had reasonable suspicion to focus on any person who was present or who was about to enter room 230 voluntarily and purposefully. The detention of Becker after the search of room 230 was reasonable to vindicate the police officers' suspicions regarding her possible connection to the contraband, or to eliminate those suspicions by giving her the opportunity to explain the extent of her involvement. *Fountain*, 2 F.3d at 666.

The reasonable suspicion that justified the initial detention of Vorburger and Becker as they were about to enter room 230 did not dissipate just because the first twenty minutes of the search of room 230 failed to reveal anything connecting them to the room or its contents. The police had information that as many as three people had had a connection to room 230 prior to 9:20 p.m. Cramer registered for the room at 2:30 p.m. (58:91). The license number Cramer gave to the motel clerk was registered to a car owned by Kokoros (58:111). The evening before, Kokoros had rented room 215, and marijuana seeds and remnants were found in room 215 (58:210, 281). At 5 p.m. on July 2, Thiel stopped Kokoros as Kokoros was about to put the key into the door for room 230 (58:115, 155). Strickland had seen possibly three people in the car when Cramer arrived to register (59:109). If Cramer and Kokoros were two of those persons, then as of 9:20 p.m. there was still a third unaccounted for.

At 9:34 p.m., Judge Bartell signed a warrant to search the motel room for evidence of possession of a controlled substance with intent to deliver (59:113; 69:1-3; Pet-Ap. 138-40). The information presented in the search warrant affidavit, Cramer's use of Kokoros' license number and the rental of rooms by Cramer and Kokoros on successive nights gave the police probable cause to believe that the room was connected with drug dealing (59:18; 68:1-8; Pet-Ap. 130-37).

In *State v. Dawson*, 983 P.2d 916, 919-20 (Mont. 1999), the court held that, where the police had probable cause to believe that a suspect was conducting drug transactions in his motel room, the police had reasonable suspicion that Dawson had committed or was about to commit a crime when he came to the room asking for the occupant. The court said that the police had sufficient cause to detain Dawson.

In this case, as in *Dawson*, the police had reasonable suspicion to believe that Vorburger and Becker had committed or were about to commit a crime when they

came to room 230 with Cramer. The police could legally detain Becker after the search revealed the marijuana so that the police could resolve the suspicions about Becker's involvement with the marijuana found in the room.

In *United States v. Pace*, 89 F.2d 1218, 1240 (7th Cir. 1990), the court concluded that the police had probable cause to arrest two nonresidents at the location that was the subject of the search warrant when the nonresidents were found exiting from a room in which money and cocaine were out in the open. The court said that the fact that the resident trusted the two nonresidents enough to have them in his home with the money and cocaine out in the open "could lead a reasonable person to conclude that it was reasonably probable that Pace and Besase [the nonresidents] were involved in a large-scale cocaine deal with Savides [the resident]. Thus, the police had probable cause to arrest Pace and Besase." *Pace*, 898 F.2d at 1240.

In this case, when the police detained the three, Cramer was about to admit Vorburger and Becker into his room where the marijuana was. Similar to the situation in *Pace*, the fact that Cramer trusted Vorburger and Becker enough that he would admit them to the motel room that had the "overpowering" smell of marijuana (59:118) and the two containers of marijuana, provided the police with at least reasonable suspicion that Vorburger and Becker were involved in a marijuana deal with Cramer. After the marijuana was found, the police lawfully detained Becker to vindicate their suspicions regarding her possible connection to the marijuana, or to eliminate those suspicions by giving her an opportunity to explain the extent of her involvement. *Fountain*, 2 F.3d at 666.

In *Orozco v. County of Yolo*, 814 F. Supp. 885, 897 n.9 (E.D. Cal. 1993), the court said that the existence of a search warrant for a home supported reasonable suspicion that persons found on the premises were involved in a drug crime; and, therefore, the persons would be considered suspects. In this case, the fact that a search

warrant was issued for room 230 and that Vorburger and Becker were about the enter the room with Cramer supported reasonable suspicion that Vorburger and Becker were involved in a drug crime and they were suspects. The police could lawfully detain Becker after the marijuana was found in order to investigate the reasonable suspicion that she was involved in the drug crime.

Because the interview of Becker after the marijuana was found in room 230 was part of the police officers' diligent pursuit of an investigation to confirm or dispel their reasonable suspicion that Becker was involved with the drugs, the duration of Becker's detention was reasonable and lawful under the Fourth Amendment. *Sharpe*, 470 U.S. at 686. Because the duration of the detention was reasonable, the detention did not escalate into an arrest due to the length of the detention.

D. The means used to detain Becker did not transform the detention into an arrest.

In concluding that a reasonable person in Becker's position would have believed she was arrested, the court of appeals cited circumstances in the case that the court said were associated with a formal arrest: *Miranda* warnings, handcuffing, separation of the suspects, the interview of Becker in a separate room, the ratio of police officers to suspects and the police refusal to permit Becker to go to the bathroom in privacy. *Vorburger*, 241 Wis. 2d 481, ¶¶ 16-18, Pet-Ap. 108-10.

In finding that the circumstances of the seizure transformed the detention into an arrest, the court of appeals engaged in the second-guessing that is prohibited by *Sharpe*. In *Sharpe*, 470 U.S. at 686-87, the Court said that the courts should not second-guess the conduct of the police; and the courts should only determine whether the police acted unreasonably and not examine whether some other alternative was available.

In light of the decisions in other cases, the police did not act unreasonably in the means and manner in which they detained Becker.

Several cases have held that handcuffing a person while a search warrant is being executed does not transform the detention into an arrest. *Torres v. United States*, 200 F.3d 179, 185-87 (3d Cir. 1999); *Fountain*, 2 F.3d at 666; *Crosby v. Hare*, 932 F. Supp. 490, 493 (W.D. N.Y. 1996) (handcuffing during ninety-minute execution of search warrant did not turn detention into arrest); *Orozco*, 814 F. Supp. at 891; *People v. Ornelas*, 937 P.2d 867, 870-71 (Colo. Ct. App. 1996); *State v. Slater*, 994 P.2d 625, 632 (Idaho Ct. App. 1999); and *In re Andre W.*, 590 N.W.2d 827, 830 (Neb. 1999).

In contexts other than the execution of a search warrant, courts have held that the use of handcuffs does not necessarily transform an investigative detention into an arrest. *Swanson*, 164 Wis. 2d at 448-49; *Tilmon*, 19 F.3d at 1224-25; *Tom v. Voida*, 963 F.2d 952 (7th Cir. 1992); and *Mitchell v. State*, 745 N.E.2d 775, 783 (Ind. 2001) (defendant not arrested when he was detained in handcuffs for 100 minutes while search warrant was obtained). Seven years ago, in *Tilmon*, 19 F.3d at 124-25, the court noted the trend toward approving the use of handcuffs during investigative detentions:

> In the recent past, the "permissible reasons for a stop and search and the permissible scope of the intrusion [under the *Terry* doctrine] have expanded beyond their original contours." *United States v. Chaidez*, 919 F.2d at 1198. The last decade "has witnessed a multifaceted expansion of *Terry*," including the "trend granting officers greater latitude in using force in order to 'neutralize' potentially dangerous suspects during an investigatory detention," *United States v. Perdue*, 8 F.3d 1455, 1464 (10th Cir.1993). For better or for worse, the trend has led to the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigatory detention.

The use of handcuffs during the execution of a search warrant is reasonable because the "'execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence. . . .'" *State v. Guy*, 172 Wis. 2d 86, 96, 492 N.W.2d 311 (1992), quoting from *Summers*, 452 U.S. at 702. In *Guy*, 172 Wis. 2d at 96, this court recognized "that weapons are often 'tools of the trade' for drug dealers" and that "'[t]he violence associated with drug trafficking today places law enforcement officers in extreme danger.'"

In *Summers*, 452 U.S. at 702-03, the Court explained that, during the execution of a search warrant for narcotics, the risk of harm to the police and the occupants "is minimized if the officers routinely exercise unquestioned command of the situation." Frisking and handcuffing the suspects until the search is completed and the suspects have been interviewed is consistent with the Court's approval to routinely exercise unquestioned command of the situation. Linsmeier told Becker he was handcuffing her for her safety and his safety. His explanation is also consistent with the Court's statement in *Summers* that the risk of harm to the police and the occupants is minimized if the police seize control of the situation.

In *In re Andre W.*, 590 N.W.2d at 829, the police officer explained that it is necessary to handcuff the suspect at the site of the search warrant execution even though he or she had been frisked "because 'on several occasions I've had people that were able to slip the handcuffs--their arms from behind up to the front which gives them access to any weapons they may have on their person.'"

Safety for the police officers and prevention of the destruction of evidence by the suspects were cited as the justifications for handcuffing the suspects during the searches in *Torres*, 200 F.3d at 185, and in *Fountain*, 2 F.3d at 663. In *Fountain*, 2 F.3d at 663, the court also

cited the prevention of the flight of the suspects as another justification for frisking them during the search.

The concerns for safety of the officers and the suspects along with the prevention of flight and the destruction of evidence made the handcuffing of Vorburger and Becker reasonable even though they had been frisked.

The fact that Kosovac read the *Miranda* warnings to Becker did not turn the detention into an arrest. *Commonwealth v. Lawrence*, 536 N.E.2d 571, 577 (Mass. 1989) ("The fact that Murphy advised the defendant of his *Miranda* rights does not mandate the conclusion that the defendant was under arrest"); and *Commonwealth v. Parker,* 522 N.E.2d 924, 928 n.2 (Mass. 1988) ("The fact that Miranda warnings were given to the defendants at their home does not mandate the conclusion that the defendants were then under arrest. Rather, the defendants were informed of their rights 'out of abundant caution to counteract any coercive element'").

Thiel testified that, when Cramer, Vorburger and Becker were detained in the hallway, they were kept five to ten feet apart (58:133). The court of appeals pointed out that Vorburger and Becker were separated, and the court apparently included the separation of the suspects among the circumstances associated with a formal arrest. *Vorburger*, 241 Wis. 2d 481, ¶¶ 17-18; Pet-Ap. 109-10.

The court cites no authority that holds that separating suspects is a circumstance of a formal arrest rather than a detention. The state submits that separation of the suspects is as reasonable for an investigative detention as it is for an arrest. Separating the suspects renders them less dangerous because there is less chance that they could act together to overcome or harm officers or to harm other motel patrons who may pass through the hallway. Separating the suspects also reduces the possibility of them communicating with one another to coordinate their explanations of their conduct. In light of these concerns,

the court should not second-guess the separation of the suspects as a means of detaining them. Because separating the suspects was not unreasonable it did not transform the detention into an arrest.

The court of appeals cited the ratio of police officers to suspects as a circumstance associated with a formal arrest. *Vorburger*, 241 Wis. 2d 481, ¶¶ 17-18; Pet-Ap. 109-10.

Gaber recalled that there were five to eight officers in the hallway at various times while the three suspects were detained in the hallway (59:61, 65). The number of police officers was not so great as to turn the detention into an arrest. When police were sent to the motel, it was not known how many would be needed. Enough would be needed to conduct the search, and it was not known how many people might show up to gain entry into the room. There had to be enough police present to conduct the search, watch over suspects and handle innocent motel patrons who may use the hallway. Gaber, Paulson and Linsmeier helped stop Cramer, Vorburger and Becker initially (58:283-84; 59:53, 55), and they entered room 230 to execute the search warrant (59:118-19).

The multiple assignments carried out by the officers demonstrate that a large number of officers was not always available to oversee the suspects. The changing number of officers available to watch the suspects provides an additional reason why frisking the suspects and handcuffing them was reasonable. The changing number is also more consistent with a detention during which an investigation is being carried out than it is with an arrest where a decision has been made to keep the suspects in custody. Under these circumstances, the ratio of officers to suspects was not so large as to turn the detention into an arrest.

The court of appeals cited the removal of Becker to a motel room for an interview as another circumstance

associated with an arrest. *Vorburger*, 241 Wis. 2d 481, ¶¶ 17-18; Pet-Ap. 109-10.

Contrary to the statement of the court of appeals, taking Becker into room 229 to use the bathroom and to conduct an interview was not a circumstance associated with an arrest. The three suspects were detained in the hallway outside room 230, and Kosovac took Becker to room 229, which was next to room 230, for the interview (59:18, 116, 194). Becker was permitted to use the bathroom in room 229 (59:194).

Taking Becker into room 229 for an interview was reasonable because police would not be conducting their duties properly if they interviewed each suspect in the presence of the others. In concluding that taking McEaddy to a separate room for an interview did not turn the detention into an arrest, the court said in *Fountain*, 2 F.3d at 666: "McEaddy was not removed from the home, placed in a squad car, or taken to the police station. *Cf. Richardson*, 949 F.2d at 856-57. Rather, the agents took McEaddy into the adjoining dining room, where he was briefly questioned."

Just as taking McEaddy to an adjoining room to be interviewed did not turn a detention into an arrest, taking Becker to the nearby room 229 did not turn her detention into an arrest.

The court of appeals cited the police officers' refusal to permit Becker to use a bathroom in privacy as a circumstance associated with a formal arrest rather than a detention. *Vorburger*, 241 Wis. 2d 481, ¶¶ 17-18; Pet-Ap. 109-10.

Becker was detained while the police conducted a drug investigation. Whether Becker was being detained or arrested, no reasonable police officer would permit her to use the bathroom unattended when she would then have an opportunity to destroy any drugs that were on her person. Arrests and detentions are both Fourth

Amendment seizures. The suspect is not free to leave in either situation. Refusing to permit a suspect in a drug investigation to use a bathroom in privacy is just as consistent with an investigative detention as it is with a formal arrest. In both situations, the police act reasonably when they refuse to give the suspect in the drug case an opportunity to flush evidence down the toilet.

Because a police officer acts reasonably in refusing to let a suspect detained during a drug investigation use the bathroom in privacy, the refusal does not transform the detention into an arrest.

Finally, the court of appeals concluded that reasonable persons in Vorburger's and Becker's situations would have believed they were under arrest because they had little if any indication how long they would be detained or what they might have to do before they were free to go. *Vorburger*, 241 Wis. 2d 481, ¶ 18; Pet-Ap. 110.

The circumstances of the situation, including what has been communicated by the police officers in their words or actions, shall be controlling under the objective test. *Swanson*, 164 Wis. 2d at 447; and *Trueber*, 238 F.3d at 92 (officers' intentions relevant only to the extent they are communicated to the defendant). A reasonable person is not under arrest when the implication of the actions of the police is that the person will be free to leave if the ongoing investigation fails to show that the person has committed a crime. *Swanson*, 164 Wis. 2d at 448; *Quartana*, 213 Wis. 2d at 450-51; and *Wilson*, 547 So. 2d at 217.

In this case, the police repeatedly told Becker and the others that they were not under arrest. Linsmeier recalled telling Becker that she was not under arrest (58:290-91). Gaber testified that, after Vorburger, Becker and Cramer were put in handcuffs, they were told they were not under arrest, they were being detained for a drug investigation (59:21-22, 76-77). Becker testified that she was told over

and over again that she was being detained but was not under arrest (59:250).

Courts have cited the officer telling the suspect he was not under arrest as a reason for finding that the suspect was detained rather than arrested. *Quartana*, 213 Wis. 2d at 450-51; *State v. Knapp*, 815 P.2d 1083, 1088 (Idaho Ct. App. 1991); and *Parker*, 522 N.E.2d at 928 (court cited the officers explicitly informing the suspects that they were not under arrest as one of the facts under which a reasonable person could not conclude that he was under arrest).

When a reasonable innocent person is told she is being detained for a drug investigation and she is not under arrest, the person would not believe that she is under arrest. The reasonable innocent person would believe that the investigation would clear her of suspicion of committing a crime and she would be free to leave when the investigation concluded. Under these circumstances, the reasonable innocent person is not under arrest.

Becker's conduct reflected her belief that she would be freed at the end of the investigation. When Becker was first detained, she told Linsmeier she had to use the bathroom (58:284). After Kosovac told Becker she would accompany Becker to the bathroom, Becker said she did not want to go (59:193).

If Becker thought that she was under arrest and was going to remain in custody, she would not have turned down the opportunity to use the bathroom. There would have been no reason to delay if she was going to remain in custody. Becker's refusal to use the bathroom reflected a belief that her detention would be temporary and she would soon be free to use the bathroom on her own after the completion of the investigation.

In summary, Becker was held in investigative detention before, during and after the execution of the

search warrant. The detention was lawful because it was supported by reasonable suspicion. The detention did not become unlawful after the execution of the search warrant because the police still had reasonable suspicion to believe that Becker, who had been stopped as she was about to enter room 230, had committed or would have committed a crime in relation to the marijuana found in the room. While Becker was being lawfully detained, she gave Kosovac consent to search the apartment she shared with Vorburger. Because Becker was being lawfully detained when she consented to the apartment search, the consent was valid under the Fourth Amendment; and the subsequent search was valid as long as the consent was voluntary. The next issue to be addressed, then, concerns whether the consent was given voluntarily.

III. BECKER VOLUNTARILY CONSENTED TO THE SEARCH OF HER APARTMENT.

The standard applied by this court in reviewing challenges to the voluntariness of a consent to search was stated in *State v. Phillips*, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998):

> Voluntariness of consent is a question of constitutional fact, and we continue to review the circuit court's determination of this mixed issue of fact and law under the two-step analysis laid out in *Turner*. Employing this standard, we will not upset the circuit court's findings of evidentiary or historical fact unless those findings are contrary to the great weight and clear preponderance of the evidence. *See Turner*, 136 Wis. 2d at 344. We will, however, independently apply the constitutional principles to the facts as found to determine whether the standard of voluntariness has been met. *See id.*

Where the trial court fails to make a specific finding of fact that appears from the record to exist, the appellate court may assume that the fact was determined in support of the trial court's decision. *State v. Angiolo*, 186 Wis. 2d 488, 495-96, 520 N.W.2d 923 (Ct. App. 1994).

Also in *Phillips*, 218 Wis. 2d at 197-98, the court described the test for voluntariness of the consent to search:

> The test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied. *See Schneckloth*, 412 U.S. at 226, 248-49; *Rodgers*, 119 Wis. 2d at 110. We make this determination after looking at the totality of the circumstances, *see Schneckloth*, 412 U.S. at 226; *Rogers*, 119 Wis. 2d at 114, considering both the circumstances surrounding the consent and the characteristics of the defendant. *See Schneckloth*, 412 U.S. at 226, 229; *Xiong*, 178 Wis. 2d at 534-36. No single criterion controls our decision. *See Schneckloth*, 412 U.S. at 226.

Under the facts in this case, Becker voluntarily consented to the search of her apartment.

In the court of appeals, Vorburger argued that Becker's consent to search the apartment was not voluntary because (1) the police were aware of her vulnerable physical and emotional condition, since Vorburger had informed Detective Olson that Becker was diabetic and was recovering from a D & C surgery; (2) Becker was upset and crying during at least part of the time she was handcuffed; (3) Becker had never been in handcuffs before and believed that she was going to be jailed; (4) Becker was never advised of her right to decline a consent to search; and (5) Becker was not presented with a written consent form, even though those forms were available to the officer requesting consent. Court of Appeals Brief of Defendant-Appellant at 23-24.

Vorburger also argued that the failure of the police to present Becker with a consent form constituted a form of deception and an unwillingness by the officer to provide any suggestion to the suspects that they need not consent to the requested search. Court of Appeals Brief of Defendant-Appellant at 24.

Olson said that Vorburger told her that Becker had just had what he described as a D & C (59:172). Olson

did not say when he told her that, but she did not interview him until 11 p.m. (59:124).

Kosovac, who interviewed Becker, said that Becker never told her about a recent operation (59:225-26). Becker, however, testified that, after the first time she asked to go to the bathroom, she explained to Kosovac that she had had a D & C (59:264).

Because the trial court did not make a factual finding regarding this conflict in testimony (31:7; Pet-Ap. 121), this court may assume that the fact was determined in favor of the trial court's decision. Because the trial court found that the consent was voluntary, this court can assume that the court found that Becker did not tell Kosovac about the surgery. In addition, Becker admitted that she never told the police that she did not feel comfortable (59:295). Becker also admitted that when she was interviewed by Kosovac she did not need any Tylenol III because she had just recently taken it (59:280). Under these circumstances, Becker's recent surgery did not render her consent involuntary because she did not tell Kosovac about it and because she was not feeling ill effects from the surgery at the time of the interview.

Kosovac said that during the interview Becker did not appear to be emotionally distraught (59:205, 227). Kosovac said Becker was not crying or body shaking (59:227-28).

Becker described two times when she cried: when she talked to Linsmeier and when cocaine was found at her apartment. Because neither time occurred when she gave consent to search her apartment, there is no basis to conclude that her crying reflected a condition that rendered the consent involuntary.

The first thing Kosovac did when they entered room 229 was to take off Becker's handcuffs. The consent to search came some time after the removal of the handcuffs.

Because the handcuffs were removed before even the start of the interview that led to the consent to search, there is no possibility that handcuffs rendered Becker's consent involuntary.

Kosovac said she probably did not tell Becker that she had a choice of not giving consent to search her apartment (59:227). She also said she did not give Becker a consent form to sign (59:237).

The consent was not rendered involuntary because of Kosovac's failure to inform Becker that she did not have to consent to the search. In *Phillips*, 218 Wis. 2d at 203, the court recognized that the failure to inform the suspect that she could withhold consent was not fatal to a determination of voluntary consent. The court explained that the state was not required to show that the defendant knew he could refuse consent. *Phillips*, 218 Wis. 2d at 203. The United States Supreme Court has also rejected the argument that a consent to search is involuntary if it is not shown that the defendant knew he could refuse consent. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

Since the police do not have to inform the suspect of the right to refuse consent, there is no basis for finding a consent involuntary just because the police do not offer the suspect a consent form to sign.

There is no basis to find Becker's consent involuntary on the grounds cited by Vorburger. Because Vorburger has provided no basis for reversing the trial court's finding that the consent was voluntary, this court should conclude that Becker's consent was given voluntarily and affirm the trial court's finding that the consent was voluntary.

CONCLUSION

For the reasons discussed above, the State of Wisconsin requests that this court reverse the court of appeals' decision that reversed the judgment of conviction.

The state requests this court to find that Becker was lawfully detained when she consented to the search of the apartment she shared with Vorburger. The state also requests this court to find that Becker gave the consent to search voluntarily.

Dated this 9th day of July, 2001.

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 10,538 words.

Stephen W. Kleinmaier
STEPHEN W. KLEINMAIER

A P P E N D I X

INDEX TO APPENDIX

STATE of Wisconsin, Plaintiff-Respondent,

v.

Bradley J. VORBURGER, Defendant-Appellant.

Court of Appeals

No. 00–0971–CR. Submitted on briefs December 13, 2000.—Decided January 25, 2001.

2001 WI App 43

(Also reported in 624 N.W.2d 398.)

RESEARCH REFERENCES

Am Jur 2d, Searches and Seizures §§ 138–141.
See ALR Index under Search and Seizure.

1. **Searches and Seizures § 32.25*—investigative stops—seizure under Fourth Amendment.**

   Both arrest and Terry investigative stop are seizures under Fourth Amendment.

2. **Criminal Law and Procedure § 195.70*—investigative stops—verifying suspicions—conditions of arrest.**

   Although police may stop individual and conduct limited investigation without probable cause to arrest, police may not seek to verify their suspicions by means that approach conditions of arrest.

3. **Searches and Seizures § 37.50*—seizure—questions of law—review.**

   Question of whether seizure has occurred based on given set of facts is question of law that appellate court reviews de novo.

*See Callaghan's Wisconsin Digest, same topic and section number.

police walking down motel hallway toward room with person who police had determined rented room, and where police subsequently executed search warrant and found large amount of marijuana and digital scale in motel room, evidence obtained as result of defendant's consent to search car and codefendant's consent to search apartment following unlawful arrest of defendant and codefendant was subject to suppression since there was no temporal distance between unlawful arrest and consent obtained from defendant and codefendant during course of that arrest, absent intervening circumstances or other developments leading to probable cause.

APPEAL from a judgment of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Reversed and cause remanded with directions.*

On behalf of the defendant-appellant, the cause was submitted on the briefs of *David D. Cook* of *Law Office of David D. Cook*, Monroe.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of *James E. Doyle*, attorney general, and *Shunette T. Campbell*, assistant attorney general.

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶ 1. DYKMAN, P.J. Bradley J. Vorburger appeals from a judgment convicting him of possession of cocaine with intent to deliver. The trial court denied his motion to suppress evidence found after he consented to a search of his car, and after Amerie Becker, his codefendant at trial, consented to a search of their apartment. Vorburger argues that evidence police obtained pursuant to the consent searches should have been suppressed because he and Becker gave consent under conditions constituting an arrest where the

police lacked probable cause justifying that arrest. The State argues that the consents were valid because Vorburger and Becker were not under arrest but subject only to a temporary investigative detention. The State also argues that even if Vorburger and Becker were subject to an unlawful arrest, their consents were nevertheless sufficiently attenuated from the arrest. We conclude that, given all the facts, Vorburger and Becker were subject to an unlawful arrest. We further conclude that their consent to search was not attenuated from the unlawful arrest. We therefore reverse.

I. Background

¶ 2. On July 2, 1997, an employee at a Madison area motel entered one of the rooms to determine whether it had been cleaned. He noticed a strong smell that made him suspicious and saw a bag containing what he thought was marijuana. He took a sample from the bag to the front desk. He or another motel employee called the police. Officers were dispatched to the motel and after looking at motel records, determined that the room was rented by Cory Cramer. The records also showed a vehicle license plate number associated with the motel room. Police checked on the plate number and found the vehicle was registered to Peter Kokoros. The police initiated procedures to obtain a search warrant.

¶ 3. Lieutenant Randall Gaber arrived at the motel, and learned that another vehicle was associated with Cramer. About six armed police officers, including Gaber, entered another motel room to stake out the one rented to Cramer. At approximately 9:20 p.m., the police saw Vorburger, Becker, and Cramer walking down the motel hallway toward Cramer's room. Cramer was holding the key.

¶ 4. The police exited the stake-out room, announcing their presence in loud voices, and directed Vorburger, Becker, and Cramer to stay where they were. Lieutenant Gaber told Cramer to put his hands on the wall, and Cramer was eventually handcuffed. Officer Linda Kosovac told Vorburger to put his hands behind his back and handcuffed him with the assistance of a deputy sheriff. Another officer handcuffed Becker's hands behind her back. The police told Vorburger, Cramer, and Becker that they were not under arrest but were being detained for further investigation. Between five and eight officers were present in the motel hallway when Vorburger, Becker, and Cramer were first detained, and a total of about eleven officers were working on the investigation.

¶ 5. At about 9:40, Becker indicated that she had to use the restroom. When Officer Kosovac said she would have to accompany her, Becker changed her mind. Becker testified that she had just undergone a D&C, was experiencing post-surgical bleeding, and did not want someone else lowering her pants for her.

¶ 6. Detective Alix Olson arrived at the motel with the search warrant at approximately 10:05. She testified that she observed Cramer, Vorburger, and Becker, still detained in the hallway. Olson took Cramer into a nearby room, showed him the search warrant, and read it to him. At approximately 10:15, several officers, including Olson, entered Cramer's room to execute the warrant. Olson detected an overpowering marijuana smell in the room, which contained a large amount of marijuana and a digital scale.

¶ 7. Shortly after 10:30, Officer Kosovac took Becker into another room and removed her handcuffs. The door to the room was left ajar about two or three

inches. After Becker used the restroom with the door to it open, Kosovac read Becker *Miranda* warnings. Kosovac explained to Becker that the police were conducting a drug investigation and began asking her questions. Becker stated that she leased an apartment, where she lived with Vorburger. Kosovac asked whether Becker had any controlled substances, and Kosovac said that she did not. Becker told Kosovac she could search her purse, and emptied it out. Becker then explained that all she had was a small amount of marijuana at her apartment. Kosovac told Becker that she wanted to confiscate the marijuana from Becker's apartment, and asked her if the police could search it. Becker consented to the search.

¶ 8. Meanwhile, the police detained Vorburger in the hallway. Detective Olson read Vorburger *Miranda* warnings at 11:00, and then asked him some questions. Olson did not indicate to Vorburger whether he was free to leave. At 11:06, she asked him if the police could search his car, and he said they could. Vorburger's car was a third vehicle on the scene in addition to Cramer's and Kokoro's vehicles. When police searched Vorburger's car, they found a "blunt"[1] and another small amount of marijuana. Gaber testified that Vorburger remained handcuffed until about 11:45 or midnight.

¶ 9. Kosovac and two other officers went to Becker's apartment and searched it with Becker present. They found marijuana, powder cocaine, hallucinogenic mushrooms, more blunts, a postal scale, and about $2,000 in cash. Becker was the sole lease-

[1] A "blunt" is a "cigar used to smoke marijuana by hollowing out the center and inserting the drug." *State v. Hughes*, 2000 WI 24, ¶ 8, 233 Wis. 2d 280, 607 N.W.2d 621.

holder of the apartment, but Vorburger had been living with her since the time she moved in.

¶ 10. Based in part on the contraband from Vorburger's car and Becker's apartment, the State charged Vorburger with several crimes. Vorburger moved to suppress the evidence obtained against him, including the drugs obtained from the search of his vehicle and Becker's apartment. The trial court denied the motion. Vorburger pleaded no contest to possession of cocaine with intent to deliver, party to a crime, in violation of WIS. STAT. §§ 961.41(1m)(cm)2 and 939.05 (1995–96). The trial court entered a judgment of conviction, and Vorburger appeals.

II. Analysis

A. Unlawful Arrest

[1, 2]

¶ 11. Both an arrest and a *Terry* investigative stop are seizures under the Fourth Amendment. *Laasch v. State*, 84 Wis. 2d 587, 595, 267 N.W.2d 278 (1978) (arrest); *State v. Taylor*, 226 Wis. 2d 490, 494, 595 N.W.2d 56 (Ct. App. 1999) (stop). Police may stop an individual and conduct a limited investigation without probable cause to arrest. *Taylor*, 226 Wis. 2d at 494. However, police may not seek to verify their suspicions by means that approach the conditions of arrest. *Florida v. Royer*, 460 U.S. 491, 499 (1983); *State v. Quartana*, 213 Wis. 2d 440, 448, 570 N.W.2d 618 (Ct. App. 1997). "[E]very seizure having the essential attributes of a formal arrest[ ] is unreasonable unless it is supported by probable cause." *Michigan v. Summers*, 452 U.S. 692, 700 (1981).

¶ 12. Vorburger argues that the police exceeded the limited scope of a *Terry* stop, and instead arrested

him and Becker. He further contends that, because the police lacked probable cause, the arrest was unlawful. Therefore, he asserts, both his consent to the car search and Becker's consent to the apartment search were fruits of unlawful arrests, and the evidence the police discovered pursuant to the consent searches should have been suppressed.[2] We agree.

[3]

¶ 13. We first address the question of whether Vorburger and Becker were subject to an arrest at the motel. The question of whether a seizure has occurred based on a given set of facts is a question of law that we review de novo. *State v. Garcia*, 195 Wis. 2d 68, 73, 535 N.W.2d 124 (Ct. App. 1995). However, we uphold the trial court's findings of fact unless they are clearly erroneous. *State v. Wilson*, 229 Wis. 2d 256, 262, 600 N.W.2d 14 (Ct. App. 1999).

[4, 5]

¶ 14. We determine the moment of arrest for Fourth Amendment purposes using an objective test. *State v. Swanson*, 164 Wis. 2d 437, 446, 475 N.W.2d 148 (1991). We ask whether a reasonable person in the defendant's position would have considered himself or herself to be in custody given the degree of restraint. *Id.* at 446–47. The totality of the circumstances, including what the police officers communicate by their words or actions, controls the outcome under the test. *Id.* at 447.

¶ 15. In *Royer*, the United States Supreme Court addressed circumstances that it concluded trans-

[2] Vorburger also argues that the police coerced his and Becker's consent, while the State counters that the consent was voluntary. Because we conclude that Becker and Vorburger gave consent while subject to unlawful arrests, we need not reach the question of whether their consent was also coerced.

formed a *Terry* stop into an arrest. *Royer*, 460 U.S. at 501–03. The defendant, Royer, was stopped in an airport after two narcotics detectives determined that he fit a drug courier profile. *Id.* at 493–94. The detectives held his airline ticket, retrieved his luggage, and took him to a small room about forty feet away from the initial stop. *Id.* at 494. After fifteen minutes of questioning in the room, a consent search of his luggage revealed marijuana. *Id.* at 494–95. However, the Court concluded that Royer's consent was invalid because he was subject to an illegal detention and that "[a]s a practical matter, [he] was under arrest." *Id.* at 503, 507–08.

¶ 16. It is useful to contrast *Royer* with *Swanson*, where our supreme court determined that a person is not subject to an arrest simply because he or she is required to perform field sobriety tests. *Swanson*, 164 Wis. 2d at 448. Noting that the defendant was not given *Miranda* warnings nor handcuffed, the supreme court in *Swanson* explained that the clear implication of a police request to perform field sobriety tests was that if the suspect passed them, she or he would then be free to leave. *Id.* We echoed this analysis in *Quartana*, concluding that even where police transported a defendant back to an accident scene before administering the field sobriety tests, he was not subject to an arrest. *Quartana*, 213 Wis. 2d at 449–50. We rested our conclusion on a determination that the defendant "had to realize that if he passed the field sobriety test, any restraint of his liberty would be lifted and he would be free to go." *Id.* at 451.

¶ 17. As soon as Vorburger and Becker approached Cramer's room, several police officers exited a neighboring room. One of the officers testified that the police told everyone to "stay where they were."

While neither Vorburger nor Becker were transported off the motel grounds, they were eventually separated. Becker's handcuffs were not removed until after she was confined to one of the motel rooms with Officer Kosovac, and she was not permitted to use a restroom in privacy. Although Vorburger was not removed to a separate room, he remained handcuffed in the hallway for over two hours. While the record does not show that the police used force against Vorburger or Becker beyond that necessary to detain and handcuff them, two officers initially apprehended and handcuffed Vorburger, and the overall ratio of police officers to suspects was approximately two or three to one.[3] Although the police never told Vorburger and Becker they were under arrest, the police told them that they were being detained,

[6]

¶ 18. Both Vorburger and Becker were read *Miranda* warnings. Becker was not handcuffed when she was given *Miranda* warnings and questioned; however, she was in a closed-off room. In light of *Royer*, it is difficult to conclude anything other than that Becker was confined and interrogated. "[D]etention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." *Dunaway v. New York*, 442 U.S. 200, 216 (1979). While Vorburger was not confined in a closed room, he remained in handcuffs after the police read him the *Miranda* warnings and while they questioned him. The State is correct that

[3] Kokoros had been apprehended earlier at the motel, and two of the police officers involved in that evening's investigation were detaining him in their squad car when Vorburger, Becker, and Cramer arrived at the motel.

police use of handcuffs does not by itself necessarily transform a stop into an arrest. *See Swanson*, 164 Wis. 2d at 448. However, this case involves many circumstances that are associated with a formal arrest in addition to handcuffing. Moreover, unlike the defendants in *Swanson* and *Quartana*, Vorburger and Becker had little if any indication of how long they would be detained or what they might have to do before they were free to go. We conclude that, considering all the circumstances, a reasonable person in either Vorburger's or Becker's position would have considered himself or herself in custody.

[7]

¶ 19. Because we have determined that Vorburger and Becker were subject to an arrest at the motel, we next address whether the police had probable cause to arrest Vorburger and Becker before they searched Vorburger's car and Becker's apartment. The State does not argue the police had probable cause, instead maintaining that the length and nature of the detention did not amount to an arrest. Because the State has not briefed this issue on appeal, we could consider it abandoned. *See State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993). However, we briefly address the issue of probable cause since our decision depends in part on whether the police had probable cause to arrest Vorburger and Becker. Whether a given set of facts gives rise to probable cause is a question of law that we review de novo.[4] *State v. Watson*, 227 Wis. 2d 167, 196, 595 N.W.2d 403 (1999).

[4] The trial court did not make a probable cause determination, presumably because it concluded that Vorburger and Becker were subject only to a temporary detention rather than an arrest.

¶ 20. Lieutenant Gaber testified that he had no information linking Vorburger to Cramer's room. Gaber also testified that he had no information about Vorburger's car, which was not associated with Cramer's room. Detective Olson testified that the police found nothing in Cramer's room linking Vorburger to the room or its contents. Olson further testified that there was no indication Becker had ever been in the room. When Vorburger, Becker, and Cramer were walking toward the room, Cramer was the one holding the key.

¶ 21. The State argues that once the police executed the search warrant and found marijuana in Cramer's room, they possessed a reasonable basis to continue to hold Vorburger and Becker. We disagree. The police already knew there was marijuana in the room before executing the search warrant because the motel employee told them so and provided them with a sample. That is how the police obtained a search warrant in the first place. Rather than further incriminate Vorburger or Becker, the search of Cramer's room served to dispel suspicion that either Vorburger or Becker were more closely linked to the room and its contents.

[8]

¶ 22. Because no evidence linked Vorburger or Becker to the marijuana in the room other than their presence outside the room with Cramer, we conclude that the police did not have probable cause to arrest Vorburger or Becker until after receiving their consent to search and discovering the contraband in Vorburger's car and Becker's apartment. Because we have concluded that Vorburger and Becker were already subject to an arrest before that time, that arrest was unlawful.

B. Attenuation

[9]

¶ 23. Not all evidence is "fruit of the poisonous tree" because it came to light after illegal police actions. *State v. Simmons*, 220 Wis. 2d 775, 780, 585 N.W.2d 165 (Ct. App. 1998). The State argues that Vorburger's consent to the car search and Becker's consent to the apartment search were sufficiently attenuated from the unlawful arrest. The ultimate question is whether the evidence the State seeks to admit came about from the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. *Id.* at 781; *see also Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

[10, 11]

¶ 24. Whether evidence should be suppressed because it was obtained pursuant to a Fourth Amendment violation is a question of constitutional fact. *State v. Anderson*, 165 Wis. 2d 441, 447, 477 N.W.2d 277 (1991). We independently review questions of constitutional fact. *Id.* In determining whether evidence is sufficiently attenuated from improper police conduct, we are required to consider (1) the temporal proximity of the official misconduct and the seizure of the evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the misconduct. *State v. Richter*, 2000 WI 58, ¶ 45, 235 Wis. 2d 524, 612 N.W.2d 29.

¶ 25. The police conduct here was not so severe as to preclude attenuation. However, the other two attenuation factors weigh heavily in favor of Vorburger.

¶ 26. The State relies primarily on *State v. Tobias*, 196 Wis. 2d 537, 553, 538 N.W.2d 843 (Ct. App. 1995), where we held that statements that the defen-

dant, Tobias, made while in custody were sufficiently attenuated from his unlawful arrest. After Tobias was unlawfully arrested, the police lawfully obtained incriminating evidence from his apartment independent of the arrest. *Id.* at 545, 550. When the police informed Tobias of their discovery, he confessed. *Id.* at 550–51. We considered the discovery of the evidence and the police act of confronting Tobias with the evidence to be significant intervening circumstances. *Id.*

[12]

¶ 27. The State argues that the results of the search of Cramer's room were significant, asserting that the discovery of marijuana in the room provided an intervening circumstance sufficient to attenuate Vorburger's and Becker's consents from their unlawful arrest. However, as we have already explained, the police found nothing linking Vorburger or Becker to the marijuana in the room. Therefore, there were no intervening circumstances as there were in *Tobias*.

¶ 28. When we examine the temporal proximity factor, we also consider all the conditions at the time of consent. *Richter*, 2000 WI 58 at ¶ 46. We have already explained those circumstances in detail and need not repeat them, but we have taken them into account and conclude that they weigh against the State.

[13]

¶ 29. In *Tobias*, we analyzed the temporal proximity factor by comparing the time that the unlawful arrest commenced to the time that Tobias made his confession. *Tobias*, 196 Wis. 2d at 544–45, 549. However, we question whether that framework applies here where no intervening circumstances arose. In *Tobias*, we concluded there was sufficient attenuation "especially because the facts indicate the statements were obtained not by exploitation of the arrest, but because

Tobias was confronted with untainted, incriminating evidence against him." *Id.* at 553. Because an unlawful arrest may be ongoing, there is arguably no temporal distance between an unlawful arrest and consent obtained from the individual during the course of that arrest, unless there are intervening circumstances or other developments leading to probable cause. Considering this and all the facts, we conclude that the temporal proximity factor weighs in favor of Vorburger as well, and that Vorburger's and Becker's consents were not attenuated from the unlawful arrest. On remand, the trial court is directed to grant Vorburger's motion to suppress.

By the Court.—Judgment reversed and cause remanded with directions.

STATE OF WISCONSIN CIRCUIT COURT Branch 4 DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. Case Nos. 97-CF-1306, 1307, 1308, and 1309

PETER J. KOKOROS, BRADLEY J. VORBURGER, COLIN J. CRAMER, and AMERIE S. BECKER

Defendants.

DECISION AND ORDER DENYING DEFENDANTS' MOTIONS

BACKGROUND

Around 4:30 p.m. on July 2, 1997, Jose Aguirre, the Motel 6 manager, entered room 230 to confirm that it had been cleaned properly. He noticed what he thought was marijuana, and retrieved a sample. He telephoned the Madison Police Department. Officers were dispatched, and Aguirre turned over the sample and informed them that room 230 was registered to Cory Cramer, who had been driving a vehicle with the Wisconsin license plate number RZY-670. The police began pursuing a search warrant for room 230 and the vehicle. They also remained at the motel, awaiting further developments.

Around 5:45 p.m., the police noticed Peter Kokoros drive up to the motel in the RZY-670 vehicle. He approached room 230 with a key in his hand. Officer Thiel began questioning Kokoros. Around 6:00 p.m., Kokoros was turned over to Officer Montie, who questioned him further. Kokoros acknowledged that he had stayed in room 215 the previous night. Around

6:30 p.m., Officer Montie moved Kokoros downstairs to his police squad car. Around 6:40 p.m., Officer Montie drove Kokoros across the street to a gas station parking lot. Around 7:15 p.m., Officer Montie handcuffed Kokoros. Between 7:00 and 7:30 p.m., the police searched room 215 and found a small quantity of marijuana.

The police entered room 229 to stake out room 230. Around 9:23 p.m., Ameries Becker, Bradley Vorburger, and Corbin Cramer approached room 230. Cramer was holding a key. The police handcuffed them and detained them. Vorburger and Cramer were left in the hallway, while Becker was questioned in a room.

The search warrant for the motel room and the RZY-670 vehicle was approved by a judge at approximately 9:34 p.m., and executed at the motel around 10:17 p.m. Approximately fourteen pounds of marijuana were found. Kokoros was arrested around 11:00 p.m. The police searched the RZY-670 vehicle around 11:37 p.m. Around 11:00 p.m., the police questioned Vorburger, received consent to search his automobile, and did so at that point. They also received consent from Carla Bender to search Cramer's automobile around midnight, and they did so at that point. Cramer and Vorburger were arrested around 11:45 p.m. Becker was not arrested that night. She travelled with the police to the apartment she shared with Vorburger and consented to its search.

SUMMARY OF ARGUMENTS

This decision deals with the issues raised in Kokoros' June 15, 1998 brief, Vorburger's June 22, 1998 brief, Cramer's June 12, 1998 brief, and Becker's June 1, 1998 brief.

Kokoros presents the following issues. First, he argues that his trial should be severed from Cramer's trial. Second, he argues for access to foundation evidence which supports the police officers' expert testimony. Third, he argues that his detention was actually an arrest. Fourth, he argues that even if his detention was not initially an arrest, it turned into one. Fifth, he argues that his vehicle was unlawfully searched because the search warrant was tainted by the unlawful detention/arrest. Sixth, he argues that the motel manager, Jose Aguirre, was acting as a government agent when he found marijuana.

Vorburger presents the following issues. First, he argues that he was arrested without probable cause, inasmuch as his detention was actually an arrest. Second, he argues that even if his detention was not initially an arrest, it turned into one. Third, he argues that his consent to search his vehicle was not given voluntarily, because it was tainted by the coercive nature of his detention. Fourth, he argues that Becker's consent to search the apartment she shared with Vorburger was not given voluntarily because it was tainted by the coercive nature of her detention; because the police indicated that if she didn't consent to a search, they'd obtain a search warrant and search anyway; because her blood sugar level was fluctuating; and because she had recently undergone a surgical procedure and was on Tylenol with codeine.

Cramer presents the following issues. First, he argues that the motel manager, Jose Aguirre, was acting as a government agent when he found marijuana. Second, he argues that Bender did not actually consent to a search of her vehicle, which Cramer had been driving. Third, he argues that even if Bender consented to a search of her vehicle, she lacked authority to do so, because it was then under Cramer's control.

Becker presents the following issues. First, she argues that she was arrested without probable cause, inasmuch as her detention was actually an arrest. Second, she argues that even if her detention was not initially an arrest, it turned into one. Third, she argues that her consent to search the apartment she shared with Vorburger was not given voluntarily because it was tainted by the coercive nature of her detention; because the police indicated that if she didn't consent to a search, they'd obtain a search warrant and search anyway; because her blood sugar level was fluctuating; and because she had recently undergone a surgical procedure and was on Tylenol with codeine.

DECISION

As the defendants' issues overlap, they will be grouped appropriately and resolved.

Severance

Kokoros seeks to be tried apart from Cramer. Severance is governed by §971.12(3), Stats., which allows relief from prejudicial joinder. It requires that the prejudice to the defendant be weighed against the public's interest in avoiding unnecessary or duplicative trials. See State v. Huff, 123 Wis. 2d 397, 409, 367 N.W.2d 226 (Ct. App. 1985). A mere demonstration of "some" prejudice is insufficient to compel severance; "substantial" prejudice is required. State v. Hoffman, 106 Wis. 2d 185, 209, 316 N.W.2d 143 (Ct. App. 1982).

The most compelling reasons for severance are absent here. Cramer has not provided a confession which inculpates Kokoros. Neither Cramer nor Kokoros has signalled an intent to pursue a mutually antagonistic defense.

Meanwhile, the principal charge against Cramer and Kokoros is the same, and the physical evidence which supports that charge is the same. The circumstantial evidence which links them is their shared affiliation with a vehicle, a motel, a motel room, and co-defendants. I conclude that any possible prejudice to Kokoros is substantially outweighed by the public interest and judicial economy served by conducting a single trial.

Discovery of foundation evidence

Kokoros seeks to compel discovery of foundation evidence underlying the testimony of any police officer who will be called to testify as an expert. This motion was previously argued and denied at a hearing on December 10, 1997. For the reasons stated at that time, I adhere to my decision to deny this motion.

Kokoros vehicle search

Kokoros argues that the search of his vehicle, which was authorized by a search warrant, was illegal because it was tainted by the illegality of his detention. I conclude that his detention was legal, as explained *infra*. In any event, even if the detention while awaiting the search warrant was illegal, the evidence found upon the execution of the search warrant is admissible if the information presented in support of the application for the search warrant was sufficiently independent of any information obtained during the detention. See Segura v. United States, 468 U.S. 796, 813-14 (1984). Such is the case here, as the information and the marijuana sample provided by Jose Aguirre, standing alone, support the search warrant.

Motel manager as state agent

Kokoros and Cramer argue that the motel manager, Jose Aguirre, was acting as a government agent when he found their marijuana and retrieved a sample. Based on the facts adduced at the hearing, see 4/2/98 transcript, I conclude that there is simply no evidence that Aguirre was acting with the participation or knowledge of the government, as is required under United States v. Jacobsen, 466 U.S. 109 (1984).

Vorburger vehicle search

Vorburger argues that the search of his vehicle, which was conducted with his consent, was invalid because his consent was given involuntarily. He argues that he was never informed of his right to refuse consent, did not give his consent in writing, had been detained at length, and was scared and paranoid. The test for voluntariness is whether consent was given in the "absence of actual coercive, improper police practices designed to overcome the resistance of a defendant," and this determination is made on the basis of the totality of the circumstances. State v. Xiong, 178 Wis. 2d 525, 532, 504 N.W.2d 428 (Ct. App. 1993).

Having considered the facts adduced at the hearing, see 4/3/98 transcript, I conclude that the two police tactics in question -- not affirmatively advising of the right to decline consent, and taking consent orally rather than in writing -- are not coercive, improper, or designed to overcome the defendant's resistance. Since I conclude that the detention is proper, as explained *infra*, I reach the same conclusion regarding it. Finally, I do not find Vorburger's self-professed fear and paranoia to be of such quality as to render him unduly susceptible to police

intimidation. Based on the testimony presented at the hearing, I conclude that the State has proven voluntariness by clear and convincing evidence.

Vorburger/Becker apartment search

Vorburger and Becker challenge the search of the apartment they shared, which was conducted with Becker's consent, on the basis that her consent was involuntary. Specifically, they argue that her consent was tainted by the coercive nature of her detention; because the police indicated that if she didn't consent to a search, they'd obtain a search warrant and search anyway; because her blood sugar level was fluctuating; and because she had recently undergone a surgical procedure and was on Tylenol with codeine.

Returning to the Xiong standard and the facts adduced at the hearing, see 4/3/98 transcript, I conclude that the police tactic in question -- explaining their willingness to pursue a search warrant, while suggesting the less-intrusive alternative of a consent search -- is not coercive, improper, or designed to overcome the defendant's resistance. Since I conclude that the detention is proper, as explained *infra*, I reach the same conclusion regarding it. Finally, I do not find Becker's health issues to be of such quality as to render her unduly susceptible to police intimidation. Based on the testimony presented at the hearing, I conclude that the State has proven voluntariness by clear and convincing evidence.

Cramer vehicle search

Cramer argues that the search of his vehicle, which was conducted with Carla Bender's consent, was invalid for two reasons. First, he argues that Bender did not actually consent to

a search of her vehicle, which Cramer had been driving. Bender's recollection on this issue differs from Detective Olson's. Compare 4/2/98 transcript at 191-92 with 4/3/98 transcript at 134-38, 175, 179. After assessing the relative credibility of the witnesses and the coherence of their testimony, I find that the most likely story is that, while Bender was initially uncomfortable about consenting to the search because she would not be present during it, her discomfort was alleviated when the police transported her to the scene, and she consented to and observed the search. Based on the testimony presented at the hearing, I conclude that the State has proven voluntariness by clear and convincing evidence.

Second, Cramer argues that even if Bender consented to a search of her vehicle, she lacked authority to do so, because it was then under Cramer's control. In light of the testimony regarding the nature of their shared authority over the vehicle, I conclude that valid consent was given. Bender's consent was sufficient to give the police authority to search a vehicle over which she shared common authority with Cramer. See United States v. Matlock, 415 U.S. 164 (1974); Soehle v. State, 60 Wis. 2d 72 (1973).

Initial and ultimate validity of detention

Kokoros was detained for approximately four and one-half hours before the search warrant was executed; he was detained for approximately five and one-quarter hours before being formally arrested. Cramer was detained for approximately one hour before the search warrant was executed; he was detained for approximately two and one-quarter hours before being formally arrested. Vorburger was detained for approximately one hour before the search warrant was executed; he was detained for approximately two and one-quarter hours before

being formally arrested. Becker was detained for approximately one hour before the search warrant was executed; she was detained for at least two and one-quarter hours before being released.

The defendants challenge their respective detentions, arguing that either they were initially unlawful, or at some point were rendered so, due to their durations and conditions.

In defending the detentions, the State chiefly relies upon Michigan v. Summers, 452 U.S. 692 (1981). In Summers, the police arrived to execute a search warrant on defendant's home just as defendant was leaving; they detained him while they executed the warrant. Although Summers only addressed a detention while a search warrant is executed, its reasoning has been extended to authorize a detention while a search warrant is being transported to the scene. See United States v. Ritchie, 35 F.3d 1477 (10th Cir. 1994).

Under United States Supreme Court jurisprudence, "the legality of temporarily detaining a person at the scene . . . to secure a search warrant" is "an open question." Rawlings v. Kentucky, 448 U.S. 98, 110 (1980). However, some guidance is provided by Segura v. United States, 468 U.S. 796 (1984).

Segura holds that when police officers secure a residence and detain its occupants in order to "preserve the status quo" (i.e., to prevent the removal or destruction of evidence, and to prevent the suspects from tipping off their friends, see id. at 815), while acting in good faith to obtain a warrant, their actions do not violate the Fourth Amendment. Id. at 798. The duration of seizure in Segura was longer than in the instant case: the search warrant was executed "some 19 hours" after the seizure was initiated. Id. at 801. Additionally, Segura holds that even if such a seizure is illegal, the evidence discovered when the search warrant is

executed is admissible (i.e., is not "fruit of the poisonous tree") if the information presented in support of the application for the search warrant was sufficient, independent of any information obtained during the seizure. Id. at 813-14. The key difference between Segura and the instant case is that the Segura defendants were arrested to preserve the status quo while awaiting a search warrant, while the defendants in the instant case were detained to preserve the status quo while awaiting a search warrant.

Although neither case disposes of the precise question presented in this case on its own, when read conjunctively, Summers and Segura seem to authorize the police conduct in the instant case. This conclusion is reinforced by United States v. Montoya de Hernandez, 473 U.S. 531 (1985), in which a woman was suspected of being a drug courier who had ingested balloons full of drugs. She was detained for sixteen hours until she defecated the balloons, and the court upheld this detention. This case suggests that detentions can last as long as necessary to protect evidence.

I therefore turn to the traditional Fourth and Fifth Amendment analysis of detentions. For a detention to pass constitutional muster under the Fourth Amendment:

> [T]he detention must be temporary and last no longer than is necessary to effect the purpose of the stop. "Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." A hard and fast time limit rule has been rejected. In assessing a detention for purposes of determining whether it was too long in duration, a court must consider "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it is necessary to detain" the suspect. In making this assessment, courts "should not indulge in unrealistic second-guessing."

State v. Wilkens, 159 Wis. 2d 618, 625-26, 465 N.W.2d 206 (Ct. App. 1990) (internal footnoted citations omitted).

I conclude that the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, by starting to pursue a search warrant when they received evidence from Aguirre. I conclude that there was not a reasonable alternative which they could have pursued which would have been as effective and less intrusive, and because they had valid concerns about destruction of evidence, flight, and tipping off others, it was reasonable to detain the suspects in the meanwhile.

For a detention to pass constitutional muster under the Fifth Amendment:

> The test is "whether a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances." [State v.] Swanson, 164 Wis. 2d [437,] 446-47, 475 N.W.2d [148,] 152 [(1991)]. The totality of the circumstances must be considered when determining whether a suspect was "in custody" for the purpose of triggering Miranda protections. California v. Beheler, 463 U.S. 1121, 1125 (1983).

State v. Pounds, 176 Wis. 2d 315, 321, 500 N.W.2d 373 (Ct. App. 1993)

> An examination of the totality of the circumstances includes such relevant factors as the defendant's freedom to leave the scene; the purpose, place and length of the interrogation; and the degree of restraint. See State v. Leprich, 160 Wis. 2d 472, 477, 465 N.W.2d 844, 846 (Ct. App. 1991); Swanson, 164 Wis. 2d at 446-47, 475 N.W.2d at 152. In exploring the degree of restraint, courts have also considered as relevant factors: (1) whether the defendant was handcuffed; (2) whether a gun was drawn on the defendant; (3) whether a Terry frisk was performed; (4) the manner in which the defendant was restrained; (5) whether the defendant was moved to another location; (6) whether the questioning took place in a police vehicle; and (7) the number of police officers involved. The fact that a defendant was being temporarily detained pursuant to Terry v. Ohio, and §968.24, Stats., is obviously a relevant consideration, but is not by itself dispositive. See Pounds, 176 Wis. 2d at 322, 500 N.W.2d at 377.

State v. Gruen, 218 Wis. 2d 581, 594-96, ___ N.W.2d ___ (Ct. App. 1998) (footnotes omitted).

In this case, defendants were not free to leave the scene. The purpose of their detention was to freeze the status quo while awaiting a search warrant, and to engage in Terry-style inquiries in the meanwhile. The place of detention was chiefly the motel in which defendants

were residing, although Kokoros was transported to a gas station across the street. The length of the detention differed for each defendant, as detailed above. The degree of restraint was modest; handcuffs were used, guns were not drawn, frisks were not performed, no additional restraints were used, only Kokoros was moved out of the motel, only Kokoros was questioned in a police vehicle, and the number of police officers involved was appropriate for the number of defendants involved. None of these factors is individually dispositive, and I conclude that cumulatively, they do not equate to arrest. The police have a fair amount of latitude in effectuating a detention without converting it into an arrest:

> In far more intrusive circumstances than this, courts in a number of jurisdictions have found certain police action to be consistent with a Terry investigative detention. For example, this court found that an investigative stop does not become an arrest merely because the police draw their weapons. Jones v. State, 70 Wis. 2d 62, 70, 233 N.W.2d 441 (1975). Furthermore, many jurisdictions have recognized that the use of handcuffs does not necessarily transform an investigative stop into an arrest. See United States v. Glenna, 878 F.2d 967, 972 (7th Cir. 1989), and United States v. Taylor, 716 F.2d 701, 709 (9th Cir. 1983). Additionally, the use of force does not necessarily transform an investigative stop into an arrest. [United States v. Laing], 889 F.2d 281, 285 (D.C. Cir. 1989), cert. denied, 110 S.Ct. 1306 (1990).

State v. Swanson, 164 Wis. 2d 437, 448-49, 475 N.W.2d 148 (1991). See also State v. Washington, 120 Wis. 2d 654, 661-62, 358 N.W.2d 304 (Ct.App. 1984) (four officers, drawn guns, an alleged blocking of a car and an intensive frisk did not rise to the level of an arrest), aff'd, 134 Wis. 2d 108, 396 N.W.2d 156 (1986).

There is no bright line which distinguishes a detention from an arrest. An arrest occurs when "a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." State v. Swanson, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991). This is an objective test, focusing on what the officer's actions and words would reasonably have communicated to the defendant, rather

than on the subjective belief of either the officer or the defendant. See id. An officer who has a reasonable suspicion is entitled to try to confirm or dispel his suspicions. See Terry v. Ohio, 392 U.S. 1, 28 (1968).

Based on the facts adduced at the hearing, see 4/2/98 transcript and 4/3/98 transcript, it is quite clear that the police repeatedly stressed to defendants that they were not under arrest, the police kept the defendants in nearby public areas (using the motel hallway as much as possible, transporting Kokoros to an adjacent gas station only to avoid tipping off the other defendants, who were yet to arrive), the police limited their questioning (to a scope more befitting a Terry stop than a custodial interrogation), and the police maintained the detention only so long as was necessary to effectuate its purpose (until they received and executed the search warrant). I conclude that what the police officers' actions and words would reasonably have communicated to the defendants was that they were not free to go, but that they were not under arrest.

This is not nullified by the duration of the detention. The detention was lengthy, but its duration was well short of those approved in Segura and Montoya. Further, it was not exploited or unduly prolonged, in conformity with the guidance of Summers: "the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention." Summers at 702. Such is the case here. The evidentiary heart of this prosecution is the massive amount of marijuana recovered from the motel room, pursuant to search warrant.

In sum, I conclude that defendants were initially validly detained, and that their detentions were not converted to arrests by their circumstances or durations.

CONCLUSION AND ORDER

For the reasons stated above, and based on the record herein, defendants' motions are denied.

Dated: November 5, 1998.

BY THE COURT:

Steven D. Ebert
Circuit Judge

cc:
ATTY MORRIS BERMAN
PO BOX 1057
306 E WILSON ST
MADISON WI 53701-1057

ATTY DANIEL DUNN
330 E WILSON ST #100
MADISON WI 53703

ADA DOUG MCLEAN
210 MARTIN LUTHER KING JR BLVD #523
MADISON WI 53709

ATTY PAUL NESSON
44 E MIFFLIN ST #402
MADISON WI 53703

ATTY TRACEY WOOD
145 W WILSON ST
MADISON WI 53703

Copy also sent to:
Bradley Vorburger
822 Mayfair Ave #2
Madison, WI 53704

Copy sent to atty. Mitch Cooper, SPD
Counsel for Vorburger
Sent on 11-5-98 PR BY

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 4 | DANE COU

State vs Bradley J Vorburger

JUDGMENT OF CONVICTION

Sentence to Wisconsin State Prisons

Date of Birth: 12-30-1974

Case No.: 97CF001307

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
5	Possess w/Intent-Cocaine (>5 15g) [939.05 Party to a Crime]	961.41(1m)(cm) 2	No Contest	Felony U	07-02-1997 to 7-3-97 on or about		06-28-199

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
5	10-04-1999	State Prisons	30 MO	Commencing forthwith.	DOC
5	10-04-1999	Forfeiture / Fine		Money obligations are converted to 4 days jail concurrent.	
5	10-04-1999	License suspended	6 MO		

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Ar Surchar
194.50	20.00				70.00		

IT IS ADJUDGED that 7 days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

IT IS ORDERED that the Sheriff execute this sentence.

BY THE COURT:

Steven D. Ebert, Judge
Douglas L McLean , District Attorney
Mark W Frank, Defense Attorney

Donna Connor

~~Circuit Court Judge/Clerk~~/Deputy Clerk

10/05/99

Date

CR-212(a) 5/99 Judgment of Conviction
DOC-20 02/92

§§939.50, 939.51, 972.13, Chapter 973 Wisconsin S

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COMPLAINT FOR SEARCH WARRANT

Exhibit # 8
Date 4-3-98
Case # 97CF1306
Circuit Br. 4 PR

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

In the Circuit Court of the County of Dane.

Alix Olson, being duly sworn, on oath complains to the said Court of the County of Dane, that on July 2, 1997, in the County of Dane, that there are now located and concealed in and upon certain premises and persons unknown within said premises, in the Town of Blooming Grove, in said Dane County, Wisconsin, and more particularly described as follows:

3438 Highway 12 & 18, the Motel 6 South, room 230. The Motel 6 South is located just east of Interstate Hwy. 90, north of Hwy. 12 & 18, and is an L shaped, two-story motel, constructed of beige painted concrete with green trim, having a brown roof. Near the southeast corner of the west wing of the motel is a large sign on a brown post. The sign has the word "MOTEL 6", with MOTEL in green, and 6 in red, on a white background. The larger background of this sign is blue in color. At the bottom of this sign in blue letters is the notation $31.99 single. Room 230 is located on the second floor of the east wing of the motel, four doors south of the north end of the east wing, on the east side of the east wing, at the intersection of the east wing north-south hallway and a hallway proceeding west from room 230. The door of room 230 is green colored metal, having the white numerals "230" on a small blue plaque, approx. 2"x4", affixed to the wall directly to the north of the door frame, approx. 1 ½ feet below the top of the door frame.

A 1988 Buick LeSabre four door, medium gray in color, bearing Wisconsin registration RZY670, vin #1G4HP54C3JH465337, registered to DAWN M. LANGER and PETER J. KOKOROS, 912 LaCrosse Street, LaCrosse, Wisconsin.

certain things, to-wit:

Marijuana containing THC, and any other controlled substances, paraphernalia associated with the use, storage and distribution of controlled substances, including but not limited to, scales, drug packaging materials, and buyers and sellers lists. Also, documents tending to identify the occupant(s) in control of said premises, including but not limited to, motel room receipts, personal correspondence, photographs, and telephone bills. Also, additional items tending to evidence drug use and trafficking, including but not limited to, U. S. currency, and other containers associated with the use, sale and distribution of controlled substances. Any and all firearms. Also, electronic equipment and devices including but not limited to pagers, computers, and cellular phones and any memory data contained therein.

which things may constitute evidence of a crime, to-wit: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, committed in violation of Section(s) 961.41(1m)(h) of the Wisconsin Statutes; and prayed that a Search Warrant be issued to search said premises and persons unknown within said premises for the property aforesaid. That the facts tending to

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establish grounds for issuing a Search Warrant are as follows:

[motel 6.sw]

*1) FACTS:

Your complainant is presently employed by the City of Madison Police Department as a detective and for the past 29 months, has been assigned to the Dane County Narcotics and Gang Task Force (DCNGTF). Your complainant has almost 16 years of experience in law enforcement, including over 11 years as a detective, 5 of which were spent in the Madison Police Department South District, where your complainant investigated numerous complaints relating to drug dealing and use. Your complainant has received specialized training and experience in the identification of habits and customs of individuals engaged in narcotics trafficking from the Wisconsin Department of Justice Division of Narcotics Enforcement, the U.S. Army Criminal Intelligence Division, the Minneapolis, Minnesota Airport Police Department, and senior members of the Dane County Narcotics & Gang Task Force. Your complainant has participated in the execution of approximately 100 search warrants as a member of DCNGTF, all of which were focused on individuals engaged in narcotics trafficking. Your complainant has also received specialized training in the identification and field testing of controlled substances from the Wisconsin State Crime Laboratory and from senior detectives with DCNGTF.

Based on my training and experience, I know the following:

a. That drug traffickers often place assets in names other than their own to avoid detection of these assets by governmental agencies;

b. That even though these assets are in other person's names, the drug traffickers continue to use these assets and exercise dominion and control over them;

c. That individuals who derive their income or a large portion of their income from the sale of controlled substances commonly maintain on hand large amounts of U.S. currency in order to maintain and finance their on-going narcotics business;

d. That drug traffickers often maintain books, records, receipts, bank statements, documents relating to safety deposit boxes and other documents evidencing money transactions.

e. That it is common for drug traffickers to secret contraband, proceeds of drug sales, large amounts of currency, financial instruments and records of drug transactions in secure locations within their residence for ready access and to conceal those items from law enforcement authorities;

f. That drug traffickers commonly maintain address or telephone numbers in books or papers which reflect names, addresses and/or telephone numbers of their associates in the drug trafficking organization;

g. That drug traffickers commonly maintain in their possession firearms at both their residence, place of distribution of controlled substances or vehicles used by drug traffickers in order to facilitate the distribution of controlled substances and to protect themselves from other drug traffickers or law enforcement officers. Your complainant has personally observed numerous firearms in the aforementioned places on a vast majority of times during the execution of search warrants or during the course of drug investigations.

h. That drug traffickers often possess papers, utility bills, telephone bills, photographs, etc., which tend to identify them as occupants of said residence.

I. That drug traffickers often possess packaging materials, scales, diluents and other paraphernalia associated with the storage and distribution of controlled substances. Such packaging materials typically include baggies, torn or cut-off baggie corners, vials, cut-out pieces of paper from magazines to be folded in the shape of pharmaceutical folds. Such diluents include Inositol and Mannitol.

j. That drug traffickers often possess a variety of controlled substances, including but not limited to, cocaine, marijuana, LSD, heroin, prescription drugs, etc.

k. That individuals engaged in drug trafficking often use motor vehicles to facilitate the transportation and sale of controlled substances.

l. That individuals engaged in drug trafficking often secrete evidence of drug trafficking within motor vehicles, and that such vehicles often contain secret compartments utilized to store and secrete controlled substances.

m. That individuals engaged in drug trafficking often utilize vehicles which are not registered in their own names to facilitate the transportation, sale, or secretion of controlled substances.

n. That individuals engaged in drug trafficking often utilize other individuals who associate with narcotics traffickers to assist in the possession and secretion of narcotics and associated paraphernalia, and that these individuals often possess evidence of narcotics possession, use and/or trafficking on their persons. Your complainant states that in numerous search warrants targeting narcotics users or traffickers in which your complainant participated, your complainant observed numerous individuals who were present who possessed controlled substances and drug-related paraphernalia on their persons; and that these persons include but are not limited to persons helping with the sales of controlled substances, potential drug buyers, and drug users.

o. That individuals engaged in drug trafficking often secrete evidence of drug trafficking on their person(s).

p. That during the execution of a search warrant targeting drug traffickers, evidence of individuals identity and ownership of vehicles and property, location of residence, are often located in the form of driver's licenses, vehicle registration forms, rent receipts, etc.

q. That individuals engaged in drug trafficking often accept stolen property in exchange for controlled substances.

r. That drug traffickers often use storage lockers and utility buildings to conceal controlled substances.

s. That individuals who engage in narcotics trafficking often take electronic equipment in trade for narcotics.

t. That individuals engaged in narcotics trafficking and their associates often possess electronic devices, such as pagers, computers, and cell phones, which are utilized by narcotics traffickers and their associates; that pagers, computers, and/or cell phones often have electronic memory capabilities, and that such electronic memory often contains evidence of narcotics trafficking, such as telephone numbers and/or other information of other individuals who assist the narcotics traffickers in the distribution and/or purchases of narcotics; that these telephone numbers and other memory information provide additional information to law enforcement concerning the extent of any narcotics trafficking activities as well as identifying other individuals engaged in narcotics trafficking with the individual possessing the electronic devices.

u. That individuals who engage in narcotics trafficking often possess evidence of narcotics trafficking in their residences and vehicles, such evidence including such items as scales, packaging materials, diluents, firearms, U. S. currency, names and address records of their narcotics trafficking associates, etc. Your complainant states that these items are often present in traffickers residences and vehicles, whether or not the actual narcotics transactions take place within the trafficker's residence and vehicles.

v. That individuals who use controlled substances routinely possess evidence of drug use in their residences and storage areas, such evidence including but not limited to pipes, rolling papers, controlled substances packaging, sandwich baggies, controlled substances residue, burnt drug residue, etc.

Your complainant knows that Marijuana containing THC is a Schedule I controlled substance under the Wisconsin Uniform Controlled Substances Act.

Your complainant believes the Duquenois-Levine field test to be truthful and accurate as it is the field test prescribed by the Wisconsin State Crime Laboratory to determine the presence of THC, the active ingredient in marijuana.

This complaint is based in part on information your complainant received from Dane County Sheriff's Office Deputy Jeffrey Thiel who advised your complainant that on 07-02-97, at approx. 4:31PM, he was dispatched to the Motel 6 South at 3438 Hwy. 12 & 18 to contact the manager regarding the manager discovering suspect marijuana inside room 230. Deputy Thiel contacted Jose L. Aguirre, the Motel 6 South manager, who turned over to Deputy Thiel a small amount of suspect marijuana which Aguirre told Deputy Thiel he had retrieved from inside room 230.

This complaint is also based in part on information your complainant received from Jose L. Aguirre, the manager of the Motel 6 South. Aguirre told your complainant that at approx. 1:30PM on 7-02-97, room 230 was cleaned by a cleaning woman employed by the Motel 6 South. Aguirre stated that it is his custom to inspect rooms after they are cleaned, to make sure that a proper cleaning has been performed. Aguirre further advised your complainant that at approx. 4:30PM on 7-02-97, he entered room 230 with his manager's pass key, with the intent of inspecting the room for cleanliness. At the time he entered the room, he did not know that it had been rented subsequent to being cleaned. Upon entry to room 230, Aguirre told your complainant that he smelled "a strong smell". He was not sure what the smell was, but told your complainant he thought that it might be burnt marijuana, although he has not smelled burnt marijuana before. Aguirre also told your complainant that upon entering room 230 he saw a reddish/orange "thermal" bag with a strap and a zipper closure, similar in size to a diaper bag,

on the floor next to the air conditioning unit. Aguirre told your complainant that he observed a greenish/brown vegetable substance in plain view in the top open area of that bag, as the zipper closure was partly open. Aguirre told your complainant that this substance was not contained within any packaging. Aguirre also told your complainant that he observed at least one large black plastic garbage bag inside the thermal bag, that appeared to be the size bag which would be used in a large trash can. He said that the thermal bag looked "kind of full". Aguirre told your complainant that this black bag was partially open, and that he was able to see a substance within that black bag which appeared identical to the greenish/brown vegetable substance he had initially observed in plain view in the top open area of the bag. Aguirre told your complainant that he suspected that this vegetable material was marijuana, even though he stated that he has not seen actual marijuana before. Aguirre told your complainant that he has seen pictures of marijuana and marijuana plants. Aguirre told your complainant that he took the loose vegetable material located in the top open area of the reddish/brown bag and went with it to the Motel 6 South office, where he placed it for safe keeping into a bag which he acquired. Aguirre told your complanant that he then called the police and was subsequently contacted by Deputy Thiel, to whom he gave the vegetable material he obtained from room 230. Aguirre advised that the thermal bag appeared to be the only bag in room 230.

Aguirre told your complainant that at approx. 2:00PM on 7-02-97, room 230 was rented to CORY CRAMER, 428 W. Monoway, Tomah, Wisconsin, who provided a DL #C656-1107-4347-05, and who also listed his vehicle as bearing Wisconsin plate RZY670. Aguirre told your complainant that CRAMER was checked in by a desk clerk named Kathy Strickland, and that CRAMER paid cash for one night.

Your complainant learned from the State of Wisconsin Department of Transportation records that the above driver's license number belongs to CORIN J. CRAMER, M/W, DOB 09-27-74, 5'11", 185 lbs., blond hair, blue eyes, 18 Ridgeview Court, #2, Madison, WI. Wisconsin Department of Transportation records also indicate that CRAMER's driving privileges have been suspended in the past through municipal court in Tomah, WI.

This complaint is also based in part on information your complainant received from Kathy Strickland, who is employed full-time as a desk clerk at the Motel 6 South. Ms. Strickland told your complainant that at approx. 2:30PM on 7-02-97, she had contact with a W/M who identified himself with a driver's license as CORY CRAMER, and who rented room 230 for one night for himself, paying cash. Ms. Strickland advised your complainant that she observed the vehicle which CRAMER arrived at the motel in, parked in front of the office, and she could observe two other people in the vehicle. She described this vehicle as dark navy blue, and said that CRAMER indicated that this vehicle was bearing WI plate RZY670. Ms. Strickland told your complainant that she asked CRAMER if the other two people in the car were also going to be staying with him in room 230 and he replied that they would not be. Ms. Strickland observed CRAMER get back into this vehicle, which then drove around towards room 230 out of her sight. Ms. Strickland further advised your complainant that on 7-02-97, several hours after she checked CRAMER in, she observed a gray vehicle in the Motel 6 South parking lot, bearing the same plate number of RZY670.

This complaint is also based in part on information your complainant received from Dane County Narcotics & Gang Task Force Officer Chris Paulson, who was dispatched to the Motel 6 South along with other Dane County Narcotics & Gang Task Force officers, after being contacted by the Dane County Sheriff's Office regarding Mr. Aguirre's discovery of suspect

marijuana in room 230. While Officer Paulson was en route to the motel, Dane County Sheriff's Office Deputy Thiel observed a 1988 Buick LeSabre four door, gray in color, bearing Wisconsin registration RZY670, arrive at the motel, being driven by a solo W/M who was subsequently identified as PETER J. KOKOROS, DOB 8-29-70, 912 LaCrosse St., LaCrosse, WI. Dane County Narcotics & Gang Task Force Officer Mike Montie contacted KOKOROS and discovered that he had the room key for room 230 at the Motel 6 South in his possession. KOKOROS told Officer Montie that he knows CORY CRAMER. Your complainant had occasion to run KOKOROS for warrants, and learned that he is currently on probation for a marijuana drug offense. Your complainant also learned from Dane County Narcotics & Gang Task Force Sgt. Gaber that on 7-01-97, KOKOROS checked into the Motel 6 South and rented room 215 for one night. Subsequent to KOKOROS checking out of room 215, room 215 was cleaned, but not re-rented on 7-02-97. Sgt. Gaber and Madison Police Department Officer Kevin Linsmeier entered room 215 at approx. 7:30PM on 7-02-97, and Sgt. Gaber later reported to your complainant that he and Officer Linsmeier both observed suspect marijuana shake and smelled the odor of burned marijuana inside of room 215.

Your complainant learned from Sgt. Gaber that on 7-02-97, Dane County Sheriff's Office Deputy Jeff Thiel conducted the Duquenois-Levine field drug test on a random sample of the suspect marijuana obtained within room 230 by Mr. Aguirre, and upon doing so, received a positive reaction for the presence of THC, the active ingredient in marijuana. Your complainant was advised by Sgt. Gaber that Deputy Thiel advised him that Deputy Thiel has received training in the identification and field testing of controlled substances from Chemist Bob Block of the Wisconsin State Crime Laboratory.

Your complainant knows from professional training and experience that persons who traffick in controlled substances often rent motel rooms from which to distribute those controlled substances, in order to avoid police detection. Your complainant also knows that persons trafficking in controlled substances from motel rooms routinely pay cash for the rooms to avoid unnecessary records, and because they often possess large amounts of cash from their drug sales. Your complainant further knows that persons trafficking controlled substances from motel rooms will often use other people to rent the rooms for them, to avoid identification and detection, and will also switch rooms with other people, for the same reasons. Your complainant knows that people who traffick in controlled substances from motel rooms often rent multiple rooms, to avoid detection, and to serve as rooms for their accomplices. Your complainant knows that controlled substances, especially marijuana, contained within large garbage bags, would constitute an amount inconsistent with personal use, but rather, would be indicative of possession with intent to deliver. Your complainant knows that a large garbage bag full of suspect marijuana is usually a "source" bag, inasmuch as this larger amount of marijuana is more easily carried from place to place in a large bag, and then divided up for individual sales into smaller bags.

Your complainant believes that the information received from Deputy Thiel, Officers Paulson, Montie and Linsmeier and Sgt. Gaber is truthful and reliable inasmuch as it was received from them during their official duties as law enforcement officials.

Your complainant believes the information received from citizens Aguirre and Strickland is truthful and reliable, inasmuch as they are employees of the Motel 6 South and their information was received during the normal course of their duties as such employees. Your complainant believes that the information received from KOKOROS was truthful and reliable, inasmuch as it

was information given against his penal interests.

Your complainant also believes the information obtained from the State of Wisconsin Department of Transportation records to be truthful and reliable inasmuch as it is information routinely kept during the normal course of business by that agency as part of its official records, and because your complainant has routinely used information obtained from the Wisconsin Department of Transportation files in the past on numerous occasions, and has found it to be truthful and reliable in the past.

WHEREFORE, complainant prays that a Search Warrant be issued to search said premises

and persons unknown within said premises, for the property aforesaid.

Dpt Alix Ulsen
Officer

Subscribed and sworn to before me
this 2nd day of July, 1997

Judge of Circuit Court, Branch 12

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SEARCH WARRANT

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4-3-98
97CF1206
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STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

In the Circuit Court of the
County of Dane.

THE STATE OF WISCONSIN, to the Sheriff, or any other peace officer for said County:

WHEREAS, Alix Olson, had this day complained in writing to this Court of the County of Dane, upon oath, that on July 2, 1997, in the County of Dane, that there are now located and concealed in and upon certain premises and persons unknown within said premises, in the Town of Blooming Grove, in said Dane County, Wisconsin, and more particularly described as follows:

3438 Highway 12 & 18, the Motel 6 South, room 230. The Motel 6 South is located just east of Interstate Hwy. 90, north of Hwy. 12 & 18, and is an L shaped, two-story motel, constructed of beige painted concrete with green trim, having a brown roof. Near the southeast corner of the west wing of the motel is a large sign on a brown post. The sign has the word "MOTEL 6", with MOTEL in green, and 6 in red, on a white background. The larger background of this sign is blue in color. At the bottom of this sign in blue letters is the notation $31.99 single. Room 230 is located on the second floor of the east wing of the motel, four doors south of the north end of the east wing, on the east side of the east wing, at the intersection of the east wing north-south hallway and a hallway proceeding west from room 230. The door of room 230 is green colored metal, having the white numerals "230" on a small blue plaque, approx. 2"x4", affixed to the wall directly to the north of the door frame, approx. 1 ½ feet below the top of the door frame.

A 1988 Buick LeSabre four door, medium gray in color, bearing Wisconsin registration RZY670, vin #1G4HP54C3JH465337, registered to DAWN M. LANGER and PETER J. KOKOROS, 912 LaCrosse Street, LaCrosse, Wisconsin.

certain things, to-wit:

Marijuana containing THC, and any other controlled substances, paraphernalia associated with the use, storage and distribution of controlled substances, including but not limited to, scales, drug packaging materials, and buyers and sellers lists. Also, documents tending to identify the occupant(s) in control of said premises, including but not limited to, motel room receipts, personal correspondence, photographs, and telephone bills. Also, additional items tending to evidence drug use and trafficking, including but not limited to, U. S. currency, and other containers associated with the use, sale and distribution of controlled substances. Any and all firearms. Also, electronic equipment and devices including but not limited to pagers, computers, and cellular phones and any memory data contained therein.

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which things may constitute evidence of a crime, to-wit: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, committed in violation of Section(s) 961.41(1m)(h) of the Wisconsin Statutes; and prayed that a Search Warrant be issued to search said premises and persons unknown within said premises for the property aforesaid.

NOW, THEREFORE, in the name of the State of Wisconsin, you are commanded forthwith to search the said premises and persons unknown within said premises for the property aforesaid, and return this Warrant within forty-eight hours, before the said Court.

WITNESS, the Honorable ANGELA B BARTELL Judge of Circuit Court, Branch 10, Dane County, Wisconsin, this 2nd day of July, 1997

Judge

ENDORSEMENT

Received by me this 2nd day of July, 1997 at 9:34 o'clock P.M.

Det. Chris Hsu

(Sheriff) (Peace Officer)

CIRCUIT COURT)
) ss.
COUNTY OF DANE)

RETURN OF OFFICER

Dated this _____ day

of _____, 19__.

at _____, Wisconsin.

I hereby certify that by virtue of the within Warrant, I searched the within named premises and found the following:

and have the same now in my possession subject to the disposition of the Court.

_____
(Sheriff) (Peace Officer)

00-0971

STATE OF WISCONSIN

SUPREME COURT

Case No. 00-0971-CR

STATE OF WISCONSIN

Plaintiff-Respondent-Petitioner,

v.

BRADLEY J. VORBURGER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

Review of a Decision of the Court of Appeals, District 4, on January 25, 2001, Reversing the Judgment of Conviction Entered on October 5, 1999 in Dane County Circuit Court, Judge Steven D. Ebert, Presiding

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SUPPLEMENTAL STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In addition to the two issues set forth in the *Statement of Issues* in the brief of Plaintiff-Respondent-Petitioner, the following issues were identified in the State's *Petition for Review* as presented for review:

1. Was the purported consent by Becker to the search of her apartment the fruit of an unlawful arrest and must the evidence seized be suppressed because the consent was not sufficiently attenuated from the unlawful conduct of the police? (Petition for Review, Issue 4)

The trial court did not address attenuation because it concluded that the confinement of Vorburger and Becker was not an unlawful arrest.

The court of appeals concluded that Becker's consent was not attenuated from the taint of an unlawful arrest.

2. Was the detention of non-occupants of a motel room, pending the obtaining and execution of a search warrant for Room 230 of the motel, in violation of their Fourth Amendment rights to be free from unreasonable seizures? (Petition for Review, Issues 1 and 3)

The trial court did not address this issue.

The court of appeals did not address this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication of the opinion are warranted by the court's grant of review in this matter.

ARGUMENT

I. EVIDENCE OBTAINED BY THE PURPORTED "CONSENT" BY BECKER TO SEARCH HER APARTMENT MUST BE SUPPRESSED BECAUSE THE PURPORTED "CONSENT" WAS THE FRUIT OF AN UNLAWFUL ARREST AND WAS NOT SUFFICIENTLY ATTENUATED FROM THAT ARREST.

Standard of review: Whether evidence should be suppressed because it was obtained pursuant to a Fourth Amendment violation is a question of constitutional fact. An appellate court must accept the trial court's underlying findings of fact unless they are clearly erroneous. However, the reviewing court independently determines whether a search or seizure passes constitutional muster. Section 805.17(2), Stats.; *State v. Eckert*, 203 Wis.2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). *State v. Richter*, 224 Wis.2d 814, 819, 592 N.W.2d 310 (Ct. App. 1999).

A. The State's Apparent Concession That Vorburger's Continued Detention Following The Receipt And Execution Of The Search Warrant Was Unlawful Is Inconsistent With The State's Argument That Becker's Continued Detention Following Receipt And Execution Of The Search Warrant Was Lawful Because The Nature, Length, And Other Circumstances Surrounding Becker's Detention Cannot Be Meaningfully Distinguished From That Of Vorburger.

As a preliminary matter, it must be noted that the State, in its *Petition for Review*, argued that review should be granted because the court of appeals' conclusion that, under the totality of the circumstances, the detention of

Vorburger and Becker was an unlawful arrest, was contrary to established United States Supreme Court and Wisconsin Supreme Court precedent (*Petition for Review* at 14-19). The State, however, then indicated that "on petition, the state will not argue that the continued detention of Vorburger following the receipt and execution of the search warrant was lawful" and noted that "[t]he state will therefore focus upon the nature and length of co-defendant Becker's detention in this case." (*Petition for Review* at 16 n.l). The State, thus, has apparently conceded that the court of appeals correctly decided this case with respect to the arrest of Vorburger.

The determination of whether the degree of restraint imposed on Vorburger and Becker amounted to an unlawful arrest is governed by the principles of *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), as set forth in part B, below, and the principles of *Florida v. Royer*, 460 U.S. 491 (1983), as set forth in part C, below. The only difference between the restraint imposed on Becker and that imposed on Vorburger is that, after execution of the search warrant, which resulted in no evidence connecting either Vorburger or Becker to the motel room or to any criminal activity, Becker was taken to a closed room of the motel, with an armed officer, where her handcuffs were removed. As the court of appeals correctly concluded, under *Royer* and *Swanson*, this is hardly a significant distinction for purposes of determining whether the suspects would believe they were under arrest. As the court of appeals noted, the circumstances of Becker's custody, even after the handcuffs

were removed after execution of the search warrant, are similar to those found to constitute an arrest in *Royer*, because in *Royer* the detainee was taken to a closed room of the airport. The court of appeals correctly concluded:

> Becker was not handcuffed when she was given *Miranda* warnings and questioned; however, she was in a closed off room. In light of *Royer*, it is difficult to conclude anything other than that Becker was confined and interrogated.
>
> *State v. Vorburger*, 2001 WI App 43, at par. 18.

Because the nature, length, and circumstances of the Becker's confinement can not be meaningfully distinguished from that of Vorburger, the state's concession that Vorburger's continued custody after execution of the search warrant was unlawful should be viewed as a concession that Becker's continued custody was also unlawful.

B. Under *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991) and *State v. Wilson*, 229 Wis. 2d 256, 600 N.W.2d 14 (Ct. App. 1999), Becker Was Arrested Prior To Her Purported "Consent" To The Search Of Her Apartment Because A Reasonable Person In Her Position Would Have Considered Herself To Be "In Custody" Given The Degree Of Restraint Under The Circumstances.

Wisconsin courts have established that the standard to determine the moment of arrest is whether a reasonable person in the defendant's position would have considered himself to be "in custody" given the degree of restraint under the circumstances. *State v. Wilson*, 229 Wis.2d 256, 267, 600 N.W.2d 14 (1999); *State v. Swanson*, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991).

In *State v. Swanson*, 164 Wis.2d 437, 475 N.W.2d 148 (1991), this Court addressed the question of whether the degree of restraint exercised when a person is required to perform a field sobriety test during a routine traffic stop constituted a formal arrest. In *Swanson*, officers observed the defendant drive onto a sidewalk in front of a tavern, almost hitting a pedestrian. As the officers approached, Swanson exited the vehicle. Swanson could not produce a driver's license and was directed to a squad car to perform field sobriety tests. The tests were apparently going to be conducted inside the squad car, and the officers conducted a pat down search of Swanson, pursuant to departmental policy, before he was placed in the squad car. The search produced a bag of marijuana, and Swanson was arrested.

In concluding that Swanson was not under arrest, this Court adopted an objective test assessing the totality of the circumstances to determine the moment of arrest for Fourth Amendment purposes:

> The standard generally used to determine the moment of arrest in a constitutional sense is whether a reasonable person in the defendant's position would have considered himself or herself to be "in custody," given the degree of restraint under the circumstances. See *Berkemer*, 468 U.S. at 441-42, and *State v. Koput*, 142 Wis.2d 370, 380, 418 N.W.2d 804 (1988). The circumstances of the situation including what has been communicated by the police officers, either by their words or actions, shall be controlling under the objective test. The officers' unarticulated plan is irrelevant in determining the question of custody. *Berkemer*, 468 U.S. at 442.
>
> *Swanson*, 164 Wis. 2d at 446-447.

The State had argued that the search of Swanson was justified because a reasonable person in Swanson's position would not believe that he or she would be free to leave, even if he or she passed the field sobriety test. *Swanson*, 164 Wis. 2d. at 448. The Court noted, however, this is not what was communicated to Swanson by the officers:

> No force, threats, or weapons were used by the officers prior to the search. In the absence of anything to the contrary, the clear implication of such a request is that if one passes the field sobriety test, he or she will be free to leave.
>
> *Swanson*, 164 Wis. 2d at 448.

Subsequent to *Swanson*, in *State v. Wilson*, 229 Wis. 2d 256, 600 N.W.2d 14 (Ct. App. 1999), the court of appeals applied the objective test for determining the point of arrest under the Fourth Amendment and concluded that a suspect was effectively arrested when the officer at his door twice refused to allow him to leave to use the bathroom. In *Wilson*, an officer went to Wilson's home, looking for a female juvenile for whom he had an arrest warrant. The officer entered the back doorway of the home and could hear several people in the basement and could smell the odor of marijuana emanating from the basement. Wilson approached the officer from the basement. After inquiring about the female juvenile, the officer asked Wilson about the marijuana odor. Wilson said he had to use the bathroom and the officer told him he could not do so until he was searched. Wilson again said he had to use the bathroom immediately and was again told he could not leave

until a search of his person was conducted. The officer then performed a pat down search and discovered a bag of marijuana. The court of appeals, applying the objective test for determining the point of arrest adopted in *Swanson*, concluded that Wilson was effectively arrested when the officer twice refused to allow him to leave to use the bathroom:

> The standard to determine the moment of arrest is whether a reasonable person in the defendant's position would have considered himself to be "in custody" given the degree of restraint under the circumstances. *State v. Swanson*, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991). Under this test, the circumstances of the situation control, including what the police officers communicate by their words or actions. See *id.* at 447, 475 N.W.2d at 152. A reasonable person in Wilson's position would believe he had been placed in custody after twice being refused the opportunity to use the bathroom until frisked. Because the degree of restraint [the officer] exerted over Wilson is sufficient to constitute an arrest, we evaluate the legality of that arrest based upon the information Ison knew when he precluded Wilson from leaving to use the bathroom.
>
> *Wilson*, 229 Wis. 2d at 267.

In the present case, the court of appeals applied the *Swanson* test for determining the point of arrest and concluded, correctly, that under the totality of the circumstances, a reasonable person in either Vorburger's or Becker's position would have considered himself or herself in custody. *State v. Vorburger*, 2001 WI App 43, par. 17, 18, 241 Wis. 2d at 491-493. Among the circumstances identified by the court as objectively indicating custody were: that as Vorburger and Becker approached Room 230 with Cramer, several police officers exited an adjoining room, ordering the three suspects to "stay where they were"; Vorburger and Becker were immediately handcuffed;

Becker's handcuffs were not removed until she was confined to one of the motel rooms with Officer Kosovac and she was not permitted to use a restroom in privacy; the overall ratio of police officers to suspects was two or three to one; the police told Vorburger and Becker that they were being detained; Vorburger and Becker were read *Miranda* warnings and then questioned; Becker was in a closed off room when she was *Mirandized* and interrogated; and Vorburger and Becker had little, if any, indication of how long they would be detained or what they might have to do before they were free to go. *Vorburger*, 2001 WI App 43, at par. 17-18.

In addition to the above circumstances noted by the court of appeals, additional circumstances indicate objectively that a reasonable person in Becker's position would have believed she was in custody. First, Becker was explicitly informed that she was not free to leave (58:291). Second, Becker was handcuffed in the hallway for over an hour, from about 9:20 until after 10:30 p.m., and was then moved to a closed off room where she was interrogated for about an hour. Officer Kosovac testified that she began interrogating Becker after 10:30 p.m., that she gave Becker *Miranda* warnings at 10:39 p.m., and that she informed Sergeant Gaber and Detective Olson of her interrogation of Becker and that Becker had consented to the search of her apartment between 11:15 and 11:30 p.m. (59:194, 203-204, 244).

The court of appeals' conclusion that a reasonable person in Becker's position would have believed she was under arrest is entirely consistent with *Swanson* and *Wilson*. In *Swanson*, the State argued that the defendant was "under arrest" when he was restrained only for the purpose of conducting field sobriety tests: no handcuffs were used, no extended period of time elapsed, no *Miranda* warnings were read, and the defendant was not told that he was not free to go. If the State can argue that Swanson was under arrest in those circumstances, it is difficult to see how it can argue that Becker was not, objectively, under arrest when she was handcuffed for over an hour in the presence of five to eight armed officers, and then confined in closed room where she was read *Miranda* warnings and interrogated for close to another hour. In *Swanson*, the State argued that a reasonable person would not believe that he or she would be free to leave after the field sobriety test but this Court rejected this view because no "force, threats, or weapons" were used by the officers prior to the search. In contrast, in the present case Becker was explicitly informed that she was not free to leave. No reasonable person in Becker's position – handcuffed for over an hour, *Mirandized* and interrogated in a closed room for up to an additional hour, informed that she was not free to leave – could believe that he or she was not in custody.

The State argues that the fact that the arresting officers told Vorburger, Becker, and Cramer that they were not under arrest but only being "detained" is in some manner relevant to this court's determination of whether the

confinement of Becker amounted to custody (*State's Brief* at 29-30). This argument fails for two reasons.

First, even if the officers initially told the subjects that they were being detained pending an investigation, there is no indication in the record that they were told this after 10:17 p.m., when the search warrant was executed and revealed no evidence connecting Vorburger or Becker to the marijuana found in Room 230. The purported "consents" to search Vorburger's vehicle and Becker's apartment were obtained at least 45 minutes after the execution of the warrant, and almost two hours after the initial detention and handcuffing. While the officers may have initially believed they were only "detaining" the subjects pending an investigation, there is no indication in the record that they continued to view the situation as merely an investigative detention after two hours had elapsed, when the "consents" to search were sought.

Second, the officers' repeated "assurances" to Vorburger and the other handcuffed subjects that they were only being detained pending an investigation is contradicted by the police reports of the arrest. Detective Alix Olson reported:

> Sgt. Gaber advised that CRAMER inserted the key in his hand into the door lock of room 230, but prior to opening the door, all three subjects were contacted by officers in the hallway **and were taken into custody.**
>
> (70:6, emphasis added).

Later, Detective Olson reports that "I identified myself to all parties **in custody**" (70:6, emphasis added). Clearly, Sergeant Gaber and Detective Olson recognized that the subjects were in custody. The State acknowledges that, under *State v. Swanson*, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991), the standard for determining the moment of arrest is "whether a reasonable person in the defendant's position would have considered himself to be 'in custody' given the degree of restraint under the circumstances". Here, even the officers considered the subjects to be in custody. Their attempts to provide assurances that the subjects were merely being detained are simply an indication of the officers' uneasy awareness that they had Vorburger and Becker in custody without a warrant and without probable cause to believe that either Vorburger or Becker had any connection to the drugs found in Room 230.

The court of appeals' decision in this case is also entirely consistent with *Wilson*. The level of restraint imposed on Becker was far greater than that involved in *Wilson*, where the court of appeals found the defendant to be objectively under arrest because he was not free to leave the officer to use the restroom. Becker was also denied permission to use the restroom by herself or in privacy (59:193, 226), but in circumstances for more indicative of arrest than those in *Wilson*. Becker was in handcuffs, with five to eight armed officers present. Becker was also confined far longer than the brief restraint

imposed on Wilson before he was searched. Becker was also confined in a closed room and was read *Miranda* warnings.

The State argues that a police officer's refusal to let a suspect detained during a drug investigation use the bathroom in privacy does not transform the detention into an arrest (*State's Brief* at 28-29). The State, however, overlooks *Wilson*, which addressed precisely this fact situation. If a reasonable person in Wilson's position would believe that he or she was in custody, certainly a reasonable person in Becker's position – experiencing a far higher level of restraint – would also believe the same.

C. The Confinement Of Becker Exceeded The Scope Of A *Terry* Stop And Was Thus An Arrest In Violation of sec. 968.24, Stats., the Fourth Amendment to the United States Constitution and Article I, , sec. 11 of the Wisconsin Constitution.

In *Terry v. Ohio*, 392 U.S. 1, 27 (1968), the United States Supreme Court recognized a "narrowly drawn" exception to the probable-cause requirement of the Fourth Amendment for certain seizures of the person that do not rise to the level of full arrests. The *Terry* court held that when the intrusion on the individual is minimal, and when law enforcement interests outweigh the privacy interests infringed in a *Terry* encounter, a stop based on objectively reasonable and articulable suspicions, rather than upon probable cause, is consistent with the Fourth Amendment. Wis. Stat. sec. 968.24 codifies the standard established in *Terry*, providing:

> 968.24 Temporary questioning without arrest.
>
> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

Under *Terry*, the test as to the right to continue custody is not probable cause to arrest, but reasonable grounds for continuing the investigative effort. *State v. Isham*, 70 Wis. 2d 718, 728, 235 N.W.2d 506 (1975).

In *Florida v. Royer*, 460 U.S. 491, (1983), the United States Supreme Court emphasized the limited scope and duration of a *Terry* stop. In *Royer*, the court found an unlawful detention and applied the exclusionary rule to evidence seized pursuant to a purported "consent" search of luggage after the defendant, suspected of being a drug courier, was detained by two police officers in a small room at an airport for 15 minutes. The Court noted that *Terry* created only limited exceptions to the Fourth Amendment's probable cause and warrant requirements, and that persons only suspected of crimes may thus not be subjected to full searches or to other means that approach the conditions of arrest:

> In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest. *Dunaway v. New York*, supra, made this clear. There, the suspect was taken to the police station from his home and, without being formally arrested, interrogated for

> an hour. The resulting incriminating statements were held inadmissible: reasonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative. *Id.*, at 211-212. *Brown v. Illinois*, 422 U.S. 590 (1975), and *Davis v. Mississippi*, 394 U.S. 721 (1969), are to the same effect.
>
> *Royer*, 460 U.S. at 499.

Additionally, the scope of a *Terry* detention must be carefully tailored to its underlying justification:

> The Amendment's protection is not diluted in those situations where it has been determined that legitimate law enforcement interests justify a warrantless search: the search must be limited in scope to that which is justified by the particular purposes served by the exception. For example, a warrantless search is permissible incident to a lawful arrest because of legitimate concerns for the safety of the officer and to prevent the destruction of evidence by the arrestee. E. g., *Chimel v. California*, 395 U.S. 752, 763 (1969). Nevertheless, such a search is limited to the person of the arrestee and the area immediately within his control. *Id.*, at 762. *Terry v. Ohio*, *supra*, also embodies this principle: "The scope of the search must be `strictly tied to and justified by' the circumstances which rendered its initiation permissible."392 U.S. at 19, quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).
>
> *Royer*, 460 U.S. at 500.

This strictly limited scope of a *Terry* stop governed both the duration of the stop and the investigative means employed:

> This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. See, e. g., *United States v. Brignoni-Ponce*, *supra*, at 881-882; *Adams v. Williams*, *supra*, at 146. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.
>
> *Royer*, 460 U.S. at 501.

Applying these principles to the facts in *Royer*, the Court concluded that, at the time Royer produced the key to his suitcase, less than fifteen minutes after being detained, the limited scope and duration of a *Terry* stop has already been exceeded. In so finding, the Court emphasized that the police had taken Royer's ticket, identification, and luggage and had never informed him that he was free to leave. *Royer*, 460 U.S. at 503. Since probable cause to arrest Royer did not exist at the time he consented to the search of his luggage, "the consent was tainted by the illegality and was ineffective to justify the search". *Royer*, 460 U.S. at 507-508.

In the present case, the limited scope and duration of a *Terry* stop was far exceeded because: (1) Becker was handcuffed with her hands behind her back and directed to sit in the hallway of a motel with one or more police officers continually present; (2) Becker's detention lasted for a period exceeding two hours; and (3) her detention continued for about an hour beyond the time when the search warrant for room 230 was executed, which was the only conceivable justification for detaining Becker initially.

First, the purported *Terry* detention was actually an arrest because Becker was handcuffed for the first hour of the "stop" prior to being transferred to a closed off room. Many courts have concluded that handcuffing of a suspect during a *Terry* stop is improper. *United States v. Acosta-Colon*, 157 F.3d 9 (1st Cir. 1998)(handcuffing drug courier suspects at

airport amounted to arrest where government could not "point to *some* specific fact or circumstance that could have supported a reasonable belief that the use of such restraints was necessary to carry out the legitimate purpose of the stop without exposing law enforcement officers, the public, or the suspect himself to an undue risk of harm"); *Baker v. Monroe Township*, 50 F.3d 1186 (3d Cir. 1995)(handcuffing not justified when police not threatened); *State v. Buti*, 964 P.2d 660 (Id. 1998)(defendant's removal from car at gunpoint and use of handcuffs converted stop into arrest where six officer were at scene and the two suspects had at all time complied with the officer's requests); *United States v. Codd*, 956 F.2d 1109 (11th Cir. 1992)(detention 2 ½ hours at airport police department while handcuffed to chair "went far beyond the boundaries of *Terry*); *Reynolds v. State*, 592 So. 2d 1082 (Fla. 1992)(police may not "routinely handcuff suspects"); *People v. Gabbard*, 398 N.E.2d 574 (Ill. 1979)(no *Terry* analysis undertaken where police placed handcuffs on defendant); *People v. Tebedo*, 265 N.W.2d 406 (Mich. App. 1978)("Laying one who has been detained on his stomach on the ground and the handcuffing of him are not the elements of an investigative stop"); *Burkes v. State*, 830 S.W.2d 922 (Tex. Crim. App. 1991)(handcuffing drug suspect and placing him on the ground constituted an arrest); *State v. Williams*, 689 P.2d 1065 (Wash. 1984)(handcuffing and other circumstances made stop unreasonable).

In addition, while courts have allowed handcuffing of suspects during a *Terry* stop and frisk in special circumstances, such as when the officers have

reason to believe the suspect is armed and dangerous and uncooperative, even then the restraint used must be temporary and the handcuffs must be removed if the pat-down reveals no weapons and the suspect is not otherwise threatening officer safety. In *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996), the court summarized many other cases involving handcuffing during *Terry* stops, concluding that such "especially intrusive" means are permissible only:

> in special circumstances, such as 1) where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight; 2) where the police have information that the suspect is currently armed; 3) where the stop closely follows a violent crime; and 4) where the police have information that a crime that may involve violence is about to occur.

See, also, *United States v. Tilmon*, 19 F.3d 1221 (7th Cir. 1994)(handcuffing proper where the officers had been informed by dispatch that bank robber was armed and dangerous); *United States v. Sanders*, 994 F.2d 200 (5th Cir. 1993)(handcuffing permissible where officer responding to man-with-gun complaint and suspect refused to lie on ground when ordered to do so); *United States v. Jones*, 973 F.2d 928 (D.C. Cir. 1992)(handcuffing proper where suspect apprehended after flight); *United States v. Taylor*, 716 F.2d 701 (9th Cir. 1983)(handcuffing proper after suspect refused to raise his hands and made furtive gestures).

In view of all of the above cases, it is clear that the handcuffing of Becker in the present case pursuant to a *Terry* stop was not justified. After the initial pat-down, which produced no weapons or contraband, the officer's had no reason whatever to continue the use of cuffs. The officers had no reports of weapons use by any suspect nor any reason to believe the suspects were armed, or violent. Officer Kosovac testified that she knew Vorburger by name from his employment as a security person for a local club (59:233-234). The suspects were entirely cooperative, offered no resistance, and disobeyed no directives. By keeping Becker handcuffed for over an hour and then removing the handcuffs only when she was confined in a closed off room, the detention was transformed into an arrest.

Second, the length of the detention in this case exceeded the scope of a *Terry* stop. The ALI Code provides that an officer may detain a person on a *Terry* stop "in no case for more than twenty minutes". Model Code of Pre-Arraignment Procedure, sec. 110.2(1)(1975). In *United States v. Sharpe*, 470 U.S. 675 (1985), the Court rejected this 20 minute limit on *Terry* detentions as a *per se* rule required by the Fourth Amendment, an approved a 40 minute detention under the circumstances of that case, where one of the defendant's had taken action that unnecessarily prolonged the duration of the stop. Both *Sharpe* and the ALI rule, however, are indicative that *Terry* stops are meant to be brief encounters.

In *United States v. Place*, 462 U.S. 696 (1983), the United State Supreme Court emphasized the brief and limited duration allowable for a *Terry* stop in the context of securing a warrant for a drug investigation. In *Place*, the suspect arrived at La Guardia Airport and was approached by two DEA agents who said that they believed he might be carrying narcotics. When the suspect refused to consent to a search of his luggage, one of the agents told him that they were going to take it to a federal judge to obtain a search warrant. The agents then took the luggage to Kennedy Airport where it was subjected to a "sniff test" by a trained narcotics detection dog which reacted positively to one of the suitcases. At this point, 90 minutes had elapsed since the seizure of the luggage. Thereafter, the agents obtained a search warrant for that suitcase and upon opening it discovered cocaine. The court found a Fourth Amendment violation, based on the length of the detention, concluding "we have never approved a seizure of the person for the prolonged 90 minute period involved here and cannot do so on the facts presented by this case". See, also, *United States v. Tillman*, 963 F.2d 137 (6th Cir. 1992)(threat to hold defendant 2-3 hours until warrant obtained improper and coercive because police lacked "probable cause" to hold defendant for that length of time); *United States v. Codd*, 956 F.2d 1109 (11th Cir. 1992)(2 ½ hour detention at airport police department went far beyond the boundaries of *Terry*); *State v. Blacksten*, 507 N.W.2d 842 (Minn. 1993)(detention of suspect on street for over an hour while search warrant sought for his arrest was unreasonable);

People v. Rodriguez, 945 P.2d 1351 (Colo. 1997)(unlawful detention where suspect held 90 minutes on suspicion of stolen van because trooper couldn't locate the VIN number). Under *Sharpe* and *Place* and the other cases cited above, the two hour confinement of Vorburger and Becker in the present case must be viewed as a violation of the *Terry* limits on detentions without probable cause.

Third, the detention in the present case exceeded the scope of a *Terry* stop because the detention continued far beyond the time that the search warrant for room 230 was executed, at 10:17 p.m. The question of whether a *Terry* stop is justified for the period of time while a search warrant is being sought is an open question. See, *Rawlings v. Kentucky*, 448 U.S. 98, 110 (1980). See also, section II, below. In the present case, however, the detention began while the warrant was being sought, continued while it was transported to the scene and executed, and *then continued for more than an hour after execution of the warrant*. It is undisputed that the execution of the warrant produced no evidence linking either Becker or Vorburger to room 230 or to any crime (59: 171). Her continued detention for about an hour after execution of the warrant indicates that she was, in fact, under arrest.

The State suggests in its brief that the record does not disclose when the police completed the execution of the search warrant (*State's Brief* at 18-19). While there was no testimony stating the precise time at which the search

of Room 230 was completed, the record certainly implies that Detective Olson completed her investigation and inventory of Room 230, then consulted with Sergeant Gaber, and that the decision was then made to begin questioning of the suspects. Detective Olson testified that she entered Room 230 to execute the warrant; that she observed evidence and made notations of her observations; that she saw no documents or indicia that Vorburger had been in the room on a previous occasion (59:168). She further testified that after she came out of the room, she consulted with Sergeant Gaber on the "best plan of action" and the decision was made to start interviewing the suspects, starting with Kokoros (8:119-120, 171). Since, according to the police, all of the suspects were being detained until the warrant was secured and executed, it is only reasonable to conclude that the decision to begin interviewing the suspects was made after the execution of the warrant was completed. That, after all, is why the suspects were being held in the first place. The State has acknowledged as much in its petition for review when it argues that the execution of the search warrant "from 10:15 p.m. to about 10:30 p.m. indicates the police were acting swiftly to determine [Becker's] connection to the illegal drugs discovered in the motel room." *Petition for Review* at 17.

D. The Arrest Of Becker Was Unlawful Because It Was Not Made Pursuant To A Warrant Or With Probable Cause.

Because Becker was objectively in custody under *Swanson* and *Wilson*, and because the initial detention of Becker was transformed into an arrest under *Royer*, *Sharp*, and *Place*, that arrest must be pursuant to either a warrant or probable cause. Neither are present here. Probable cause exists when the facts and circumstances known to the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed and the arrested person is the guilty person. *West v. State*, 74 Wis. 2d 390, 398, 246 N.W.2d 675 (1976).

Although the State did not, in the court of appeals, brief the issue of whether probable cause existed to arrest Vorburger or Becker, that court addressed the question and concluded that the police did not have probable cause to arrest Vorburger or Becker until after receiving the consents to search and discovering contraband in Vorburger's vehicle and Becker's apartment. The court of appeals noted the following undisputed facts in support of the conclusion that no probable cause existed to arrest Vorburger or Becker:

> Lieutenant Gaber testified that he had no information linking Vorburger to Cramer's room. Gaber also testified that he had no information about Vorburger's car, which was not associated with Cramer's room. Detective Olson also testified that the police found nothing in Cramer's room linking Vorburger to the room or its contents. Olson further testified that there was no indication Becker had ever been in the room. When Vorburger, Becker, and Cramer were walking toward the room, Cramer was the one holding the key.
>
> *Vorburger*, 2001 WI App 43, at par. 20.

The court of appeals rejected the argument that the discovery of the marijuana in Room 230 after execution of the search warrant provided a basis for continuing to confine Vorburger and Becker, noting that the police were already aware of the presence of the marijuana in the room prior to execution of the search warrant because a motel employee had so informed them and had provided them with a sample. The court of appeals noted that, rather than incriminating Vorburger or Becker, the search of the motel room served to dispel any suspicions that they were connected to the room and its contents. *Vorburger*, at par. 21.

In this case, the officers, by their own admission, had no probable cause to arrest Vorburger until after the purported "consent" search of his vehicle (59:26-30). The officers had no evidence connecting Vorburger with room 230 of the motel, either before or after the execution of the warrant (59:171). Mere association with a suspected drug dealer does not, by itself, create probable cause for arrest. *Sibron v. New York*, 392 U.S. 40 (1968); *Ybarra v. Illinois*, 444 U.S. 85, 88-91 (1979). Becker was confined merely because she came to the motel with Cramer, the person who rented room 230. Because the circumstances of her confinement amounts to an arrest under *Wilson, Swanson, Royer,* and *Place*, *supra*, and lacked probable cause, the arrest was unlawful.

E. The Purported "Consents" Were The Fruit Of An Unlawful Arrest And Must Be Suppressed Because The "Consents" Were Not Sufficiently Attenuated From The Unlawful Conduct Of The Police.

When consent to a search is obtained after a Fourth Amendment violation, evidence seized as a result of that search must be suppressed unless the State can show a sufficient break in the causal chain between the illegality and the seizure of evidence. *Brown v. Illinois*, 422 U.S. 590 (1975); *State v. Richter*, 224 Wis.2d 814, 823, 592 N.W.2d 310 (Ct. App. 1999); *State v. Phillips*, 218 Wis.2d 180, 204, 577 N.W.2d 794, 805 (1998). In *Brown*, the Court suppressed a confession tainted by an unlawful arrest, reversing the lower court's holding that the giving of *Miranda* warning served to attenuate the taint of the arrest. The Court noted the origin of attenuation analysis in *Wong Sun v. United States*, 371 U.S. 471 (1963):

> In *Wong Sun*, the Court pronounced the principles to be applied where the issue is whether statements and other evidence obtained after an illegal arrest or search should be excluded. In that case, federal agents elicited an oral statement from defendant Toy after forcing entry at 6 a.m. into his laundry, at the back of which he had his living quarters. The agents had followed Toy down the hall to the bedroom and there had placed him under arrest. The Court of Appeals found that there was no probable cause for the arrest. This Court concluded that finding was "amply justified by the facts clearly shown on this record."371 U.S. at 479. Toy's statement, which bore upon his participation in the sale of narcotics, led the agents to question another person, Johnny Yee, who actually possessed narcotics. Yee stated that heroin had been brought to him earlier by Toy and another Chinese known to him only as "Sea Dog." Under questioning, Toy said that "Sea Dog" was Wong Sun. Toy led agents to a multifamily dwelling where, he said, Wong Sun lived. Gaining admittance to the building through a bell and buzzer, the agents climbed the stairs and entered the apartment. One went into the back room and brought Wong Sun out in hand-cuffs. After arraignment, Wong Sun was released on his own recognizance. Several days later, he returned voluntarily to give an unsigned confession.

> This Court ruled that Toy's declarations and the contraband taken from Yee were the fruits of the agents' illegal action and should not have been admitted as evidence against Toy. *Id.*, at 484-488. It held that the statement did not result from "'an intervening independent act of a free will,'" and that it was not "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Id.*, at 486. With respect to Wong Sun's confession, however, the Court held that in the light of his lawful arraignment and release on his own recognizance, and of his return voluntarily several days later to make the statement, the connection between his unlawful arrest and the statement "had 'become so attenuated as to dissipate the taint.' *Nardone v. United States*, 308 U.S. 338, 341," *Id.*, at 491.
>
> *Brown*, 422 U.S. at 597-599.

The court concluded that the giving of *Miranda* warnings is not sufficient, in itself, to purge the taint of an unlawful arrest. The court identified three factors relevant to whether the taint of an unlawful arrest is attenuated: (1) the temporal proximity of the official misconduct and the subsequent seizure of evidence; (2) the presence of intervening circumstances; and (3) the purposefulness and flagrancy of the official misconduct. *Brown,* 422 U.S. at 603-604; *Phillips*, 218 Wis. 2d at 205. The ultimate question is whether the evidence was obtained because of the exploitation of a prior police illegality. *State v. Anderson*, 165 Wis.2d 441, 447-48, 477 N.W.2d 277, 281 (1991).

In the present case, the purported "consents" to search both the Vorburger vehicle and the Vorburger/Becker apartment were obtained directly as a result of the unlawful arrest of Vorburger and Becker. Vorburger's purported "consent" to search his car was given after he had been seated, with hands cuffed behind his back, for two hours and 45 minutes after

the search warrant for room 230 had been executed and had produced no evidence of crime relating to Vorburger. The request to search his vehicle came after Becker, who was similarly unlawfully detained, had been questioned by Kosovac and had indicated that she and Vorburger had smoked a joint in Vorburger's car that day. Similarly, Becker's purported "consent" to the search of her apartment was obtained after questioning by Kosovac that occurred after execution of the warrant and after finding nothing in room 230 related to Becker. Under these circumstances, the request to search Vorburger's car and the Vorburger/Becker apartment can only be viewed as an exploitation of the illegal arrest. The State, which has the burden to show attenuation, has offered no reason why a search of the vehicle or apartment would be related to the investigation of room 230.

Before looking in detail at the three factors relevant to whether the taint of an unlawful arrest is attenuated, it must be noted that the State has apparently conceded that, with regard to the purported "consent" given by Vorburger for the search of his vehicle, the taint of his unlawful arrest was not attenuated. In its *Petition for Review*, the State noted the following at the beginning of a section dealing with the attenuation issue:

> Because the state will not argue that Vorburger's detention following the receipt and execution of the search warrant was lawful, the state does not challenge the exclusion of the evidence discovered in the Vorburger vehicle. *Petition for Review* at 20.

Because this statement is made in the context of addressing the attenuation question as applied to Becker's consent, it is a concession that even if Vorburger's detention amounted to an arrest without probable cause, the taint of that unlawful arrest was not attenuated and therefore the suppression of evidence ordered by the court of appeals with regard to Vorburger's vehicle will not be challenged. This concession is significant because the nature and circumstances of Becker's custody and purported "consent" are substantially similar to those of Vorburger. Moreover, although the State indicated in its *Petition for Review* that one issue on review would be "whether evidence subsequently seized pursuant to voluntary consents was nevertheless required to be suppressed on grounds that the evidence was tainted by the prior detention," the State has not addressed this question in its brief in chief.

Applying the three factors recognized in *Brown*, *supra*, as relevant to whether the taint of an unlawful arrest is attenuated, this court should conclude, as did the court of appeals, that Vorburger's and Becker's consents were not attenuated from the unlawful arrest.

Temporal proximity.

Citing *State v. Tobias*, 196 Wis. 2d 537, 545, 538 N.W.2d 843 (Ct. App. 1995), the State argued in the court of appeals that the length of time between the illegal police conduct and the consents to search was sufficient to dissipate the taint of the illegal arrest, especially in light of the "non-threatening,

congenial" conditions under which the consents were obtained (*State's Brief* in Court of Appeals, at 18). In *Tobias*, the defendant, a convicted felon who had already spent four years in prison, was unlawfully held in custody at a police station, with access to a telephone, restroom, and cigarettes, for 1 ½ hours prior to making the statements that were the subject of the appeal. The court of appeals concluded that the circumstances of the custody were nonthreatening and congenial, and that the 90 minute period between the illegal police conduct and the challenged statement weighed in favor of attenuation.

In the present case, the "temporal proximity" factor does not weigh in favor of attenuation for two reasons. First, the temporal relationship between an unlawful arrest and the consents to search is an ambiguous factor because, as the United States Supreme Court recognized in *Dunaway v. New York*, 442 U.S. 200, 220 (1979), if there are no relevant intervening circumstances, a prolonged detention may be a more serious exploitation of an illegal arrest than a short one." This is true in the present case, where the police continued the custody of Vorburger and Becker while a warrant was obtained, while the warrant was executed, and then for a significant period of time after the execution of the warrant had revealed no incriminating evidence connecting either Becker or Vorburger with Room 230. After the warrant was executed, at 10:17 p.m., the police realized that they had no evidence whatever connecting either Vorburger or Becker to Room 230 (59:171). Instead of

releasing them, the police began to exploit the unlawful detention by questioning designed to elicit incriminating statements and evidence unrelated to Room 230. Becker was questioned first, beginning around 10:30 p.m. (59:194). Only at this point were her handcuffs removed (59:194). After Becker had revealed that she and Vorburger had smoked a marijuana blunt that afternoon, in Vorburger's car, Detective Olson came to Vorburger, at 11:00 p.m., seeking permission to search his car (70:8). None of the officers ever had any reason to connect either Vorburger or Becker with the marijuana found at the motel. The questioning that occurred after the execution of the warrant can only be viewed as an exploitation of the unlawful arrest.

Second, the "temporal proximity" factor does not weigh in favor of attenuation because the conditions of the custody of Vorburger and Becker were far from "nonthreatening and congenial". They were handcuffed, surrounded by police officers, and forced to sit in the hallway of a motel that they had no connection with, with no access to a telephone or any amenities. Becker, who had never been arrested or stopped by the police before, testified that the reason she came to the motel in the first place was to use the bathroom:

> First thing that I – that they said to me was, you know, "What are you doing here," and I had expressed that I was coming inside to use the bathroom, and I was really upset. I was crying. I was scared. I didn't know what was going on.
>
> . . .

> So I basically had asked the gentleman who was – who was watching me if I could use the bathroom. He said he would need to get a female deputy, and so he got Officer Kosovac – is that correct – and she came up and she – I asked her if I could use the bathroom, and she said that would not be a problem but she wasn't going to be able to remove the cuffs. I was really upset. I wasn't feeling well. I had just gone through a D and C, and obviously after you go through a D and C, you have discharge and bleeding, and I didn't feel comfortable having somebody else lower my pants for me, you know what I mean? Like I felt like – I was embarrassed I guess basically, and so I started crying again then, and I just said, "Never mind," and then basically we stood there for probably another – more than an hour.
>
> 59:249-250.

Although Becker, after over one hour, was ultimately relieved of the handcuffs and allowed to use the restroom without assistance, she remained confined in one of the motel rooms, in the presence of an armed officer during her interrogation and while giving her purported "consent". These circumstances are far more threatening, unpleasant, and hostile than those encountered by the defendant in *Tobias*.

Intervening circumstances.

The State, again relying on *Tobias*, argued in the court of appeals that the confrontation of both Vorburger and Becker with the incriminating evidence of the large amount of marijuana discovered in Room 230 constituted an intervening circumstance weighing in favor of attenuation of the consents to search (*State's Brief* in Court of Appeals at 19). In *Tobias*, officers received permission from the defendant's stepfather to search an

apartment, resulting in the discovery of incriminating evidence of the defendant's burglary and theft that was untainted by the illegal arrest of the defendant. This untainted evidence was presented to Tobias, and led directly to the incriminating statements that were sought to be suppressed. The court of appeals concluded that this confrontation of the defendant with untainted evidence constituted an "intervening circumstance" that purged the taint of the illegal arrest. *Tobias,* 196 Wis. 2d at 550-551.

Unlike in *Tobias*, in the present case neither Vorburger nor Becker were ever confronted with any evidence that incriminated *them*. As the court of appeals recognized, the marijuana found in Room 230 was never connected in any manner to either Vorburger or Becker, and there is no evidence in the record that, in seeking to obtain the consents to search Vorburger's vehicle and Becker's apartment, either subject was informed of anything found in Room 230. In this case, no incriminating evidence relating to Vorburger or Becker was found until the consent searches were performed.

In *State v. Richter*, 2000 WI 58, --- Wis. 2d. ---, --- N.W.2d --- (2000), this Court recognized that, under some circumstances, a conversation between an officer and a defendant can operate as an intervening circumstance weighing in favor of attenuation "if it provided the [subject] with sufficient information from which he could decide whether to freely consent to the search." *Richter*, 2000 WI at par. 50. In *Richter*, the officer had a brief

conversation with the defendant prior to the search indicating the defendant was not the target of the search but that his purpose for wanting to search the trailer was to look for an intruder. The court concluded that this information was sufficient to allow the defendant to freely consent to the search. *Richter*, 2000 WI at par. 51. Unlike in *Richter*, in the present case it was always clear to both Vorburger and Becker that *they* were the objects of the requested searches. The request to search Vorburger's vehicle came after Becker had told the police that she and Vorburger had smoked marijuana in the vehicle earlier that day (59:201, 70:8). When the police requested Vorburger's consent to search the vehicle, they did not inform him of Becker's statement (70:8-9). Similarly, the request to search Becker's apartment came after she told police that there might be small amounts of marijuana at the apartment (59:201). Clearly, both Vorburger and Becker were the objects of the searches. No intervening circumstances were present in this case to attenuate the connection between the consents and the unlawful arrests.

Purpose and flagrancy of the misconduct.

The State also argued in the Court of Appeals that there is no evidence of purposeful or flagrant misconduct in this case, noting that Vorburger and Becker were repeatedly informed that they were not being arrested, but only detained (*State's Brief* in Court of Appeals at 20). In *Richter*, the court noted

that this factor involves an inquiry into whether the police exploited an unlawful arrest in order to pressure the defendant to consent or in the hopes of finding evidence against the defendant. *Richter*, 2000 WI at par. 53-54. In that case, no evidence of purposeful or flagrant misconduct was recognized because the purpose of the officer's "was directed at apprehending a burglary suspect, not getting the goods on Richter". *Id.* In the present case, however, the only purpose the police had in seeking a consent to search Vorburger's vehicle and Becker's apartment was "to get the goods" on Vorburger and Becker. The officers' repeated proclamation that the subjects were only being detained shows their awareness of the important difference between detention and arrest, and represents, at best, a disingenuous effort to transform an arrest into a detention merely by naming it a detention, particularly in view of the fact that Detective Olson's written report indicates that both she and Sergeant Gaber described the detention of the suspects as being "in custody" (70:6).

After the execution of the search warrant for Room 230 turned up no evidence incriminating Vorburger or Becker, the officers should have known that continued custody of Vorburger and Becker was unlawful and that the subjects must be released. Instead, the officers exploited the situation, using the custody of both Vorburger and Becker as an opportunity to seek and obtain incriminating evidence wholly unrelated to the drugs found at the motel. The officers' actions in requesting consent to search the vehicle and apartment is, under these circumstances, both purposeful and flagrant.

For all of these reasons, Becker's consent to the search of her apartment was not attenuated from the unlawful arrest, and the evidence seized pursuant to that consent should be suppressed.

II. THE DETENTION OF VORBURGER AND BECKER, NON-OCCUPANTS OF THE MOTEL ROOM, PENDING THE OBTAINING AND EXECUTION OF A SEARCH WARRANT, VIOLATED THEIR FOURTH AMENDMENT RIGHTS TO BE FREE FROM UNREASONABLE SEIZURE UNDER MICHIGAN V. SUMMERS, 452 U.S. 692 (1981).

The State noted in its petition for review that this case presented the questions of (1) whether the Fourth Amendment permits police officers to detain non-occupants of a motel room while awaiting a search warrant when the officers have specific and articulable facts connecting suspects to the room in which drug activity is occurring; and (2) whether upon receipt of the search warrant, the detention of the non-occupants may continue. *Petition for Review* at 1-2 (Issues 1 and 3). The State also noted that neither the trial court nor the court of appeals had addressed these questions. In response, Mr. Vorburger noted that in his case, the detention of the non-occupants of the motel room did not end after the search warrant was obtained and executed, but continued well beyond the execution of the warrant even though the search made pursuant to the warrant revealed no evidence whatsoever connecting either Vorburger or Becker to Room 230 or to illegal drugs found in that room. Mr. Vorburger noted that the court of appeals had addressed the question of

whether the confinement of Vorburger and Becker, under the totality of the circumstances including the period of confinement and interrogation after the execution of the warrant, amounted to an arrest. Mr. Vorburger then noted that, because the court of appeals considered the continued detention and interrogation of the non-occupants of the motel room even after the execution of the warrant in concluding that they were, in fact, under arrest, the narrower questions of whether the detention of Vorburger and Becker pending the obtaining and execution of the warrant was lawful was not presented. In stating this, Vorburger by no means conceded that his detention and Becker's detention during the obtaining and execution of the warrant was lawful. Vorburger noted in his brief in the court of appeals that the lawfulness of his detention during these periods was an open question under *Michigan v. Summers*, 452 U.S. 692 (1981) and *Rawlings v. Kentucky*, 448 U.S. 98, 110 (1980) (*Defendant-Appellant's Brief* in Court of Appeals at 15-16). Vorburger's only point, in responding to the *Petition for Review*, was that this court does not need to address the narrow question of the lawfulness of the detention of the non-occupant suspects pending the obtaining and execution of the search warrant because the facts present a much clearer basis upon which to determine the question of whether this was an arrest. Given the continued detention of Vorburger and Becker even after the execution of the warrant had dispelled any grounds for suspecting that either of them was connected to Room 230, the question of "arrest", whether viewed from the objective test set forth in

Swanson, or viewed from the test for determining when an investigative detention is transformed into an arrest under *Royer*, can be decided apart from any limitations on the detention of non-occupants of a dwelling identified in *Michigan v. Summers*.

The State has chosen to not address the first and third issues presented in the *Petition for Review* (*State's Brief* at 13). The detention of Vorburger and Becker, however, pending the obtaining and execution of a search warrant, violated their Fourth Amendment rights to be free from unreasonable seizure under *Michigan v. Summers*, 452 U.S. 692 (1981). In *Summers*, Detroit police officers were about to execute a search warrant for narcotics at Summer's home when they encountered him as he left the house. The police detained him and seven others present on the premises while the warrant was executed. The search discovered narcotics in the basement. Summers, the owner of the house, was arrested and searched, and heroin was found on his person. Summers moved to suppress the heroin because it resulted from an unlawful detention while the warrant was being executed. The Supreme Court held that the valid search warrant provided the officers with limited authority to detain the "occupants" of the premises during the search. The Court found the detention justified given law enforcement interests in preventing flight in the event incriminating evidence was found; the interest in minimizing the risk of harm to the officers; and the interest in the orderly completion of the search. *Summers*, 452 at 702-03. The Court also looked at "the nature of the

articulable and individualized suspicion on which the police base[d] the detention of [Summers]." *Id.* In this regard, the Court noted that the connection of an "occupant" to a home "gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant. *Id.* at 703.

Applying the criteria set forth in *Summers* to the present case involving the detention of non-occupants of a motel room, this Court should conclude that the detention was unlawful. First, the risk of harm to officers executing a search warrant of a dwelling is not significantly reduced by the detention of non-occupants. Non-occupants, by definition, are not within the dwelling and thus are not within the area that is being searched, and not in a position in which they could harm the officers conducting the search. Second, the interest in the orderly completion of the search is not addressed by the detention of non-occupants. Since non-occupants, by definition, are not in the dwelling that is being searched, they are not in a position to hide or attempt to destroy evidence being sought, or to otherwise disrupt the orderly progression of the search. Third, since a non-occupant is not actually "in the home" or "in the dwelling", he or she would not – as an occupant would – give an officer "an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention," as in *Summers*. Finally, it must be remembered that, in the present case, Vorburger and Becker were detained not only during the relatively short period of time while the warrant

was executed, but also for about one hour, from 9:20 to 10:17 p.m., while the warrant was being secured.

The State argued in its *Petition for Review* that the recent United States Supreme Court decision in *Illinois v. McArthur*, ___ U.S. ___, 121 S. Ct. 946, 949 (2001), a case involving the detention of suspect pending the obtaining of a warrant, supports a "more expansive view of what constitutes a reasonable detention based on the totality of the circumstances" than the view of the court of appeals in this case (*Petition for Review* at 11-12). *McArthur*, however, addresses a completely different set of circumstances than that presented by the present case and actually supports, by implication, the court of appeals' decision in this case. In *McArthur*, police officers, with probable cause to believe that McArthur had marijuana hidden in his house, prevented him from entering his house for a period of two hours while they obtained a search warrant, because they feared he would destroy the drugs. Upon execution of the warrant, drugs were found and McArthur was arrested. The court upheld the temporary detention of McArthur under these circumstances.

The circumstances of the present case are quite different from those in *McArthur*. First, Vorburger and Becker were not residents of the motel room for which a search warrant was sought, and there was no concern that they be detained to prevent them from entering the room to destroy evidence. Second, Vorburger and Becker were handcuffed during their detention,

whereas McArthur was allowed to move about and even enter his home, under observation, to make phone calls and obtain cigarettes. Most importantly, unlike in *McArthur*, the execution of the search warrant in this case yielded no evidence connecting Vorburger and Becker to the room searched. Nevertheless, the police continued to detain, handcuff, and interrogate Vorburger and Becker even after the warrant was executed. It was this continued detention and interrogation of Vorburger and Becker, even after execution of the search warrant, that was considered by the court of appeals in determining whether the initial stop was transformed into an arrest. If *McArthur* has any bearing on the present case, it is in the implication that the continued detention of McArthur after execution of the search warrant would have been unlawful if the search of his home had produced no evidence connecting him to criminal activity.

For all of the above reasons, the detention of Vorburger and Becker while the warrant was being secured and executed can not be justified under the limited exception to the probable cause requirement recognized in *Michigan v. Summers.*

III. EVIDENCE OBTAINED BY THE PURPORTED "CONSENT" TO SEARCH BECKER'S APARTMENT MUST BE SUPPRESSED BECAUSE THE PURPORTED CONSENT WAS NOT VOLUNTARY.

Standard of review: In *State v. Bermudez*, 221 Wis.2d 338, 345, 585 N.W.2d 628 (Ct.App. 1998), the court set forth the standard of review for questions involving the voluntariness of a consent to search under the Fourth Amendment:

> Voluntariness of consent is a question of constitutional fact, and we . . . review the circuit court's determination of this mixed issue of fact and law under the two-step analysis laid out in *Turner*. *State v. Phillips*, 218 Wis.2d 180, 194-95, 577 N.W.2d 794, 801 (1998) (referencing *State v. Turner*, 136 Wis.2d 333, 401 N.W.2d 827 (1987)). There are two facets to this determination and the appellate court applies a different standard of review to each. See *id.* at 189-94, 577 N.W.2d at 799-800. This two-step process is that a trial court's findings of evidentiary or historical facts "will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence." *Id.* at 190, 577 N.W.2d at 799 (quoted source omitted). However, when reviewing the trial court's determination of constitutional questions, "the appellate court independently determines the questions of 'constitutional' fact.' *Id.* (quoted source omitted). We therefore owe no deference to the trial court when making our determination of whether the constitutional standard of voluntariness had been met. See *State v. Xiong*, 178 Wis.2d 525, 531, 504 N.W.2d 428, 430 (Ct. App. 1993). "[W]e are permitted to independently determine from the facts as found by the trial court whether any time-honored constitutional principles were offended in this case." *Phillips*, 218 Wis.2d at 192, 577 N.W.2d at 800 (quoting *Turner*,) 136 Wis.2d at 344, 401 N.W.2d at 833).

Assuming for argument only that the arrest of Vorburger and Becker was lawful or that, if unlawful, the purported "consents" to search were attenuated, the consents were not voluntary. When the State attempts to

justify a warrantless search on the basis of consent, the Fourth Amendment requires that the State demonstrate that the consent was voluntarily given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973); *Florida v. Royer*, 460 U.S. 491, 497 (1983). The State has the burden of proving by clear and convincing evidence that the defendant's consent was voluntary. *State v. Phillips*, 218 Wis.2d 180, 197, 577 N.W.2d 794 (1998); *State v. Rodgers*, 119 Wis.2d 102, 114 (1984); *State v. Xiong* 178 Wis.2d 525, 532, 504 N.W.2d 428 (Ct. App. 1993).

In *Phillips*, the Wisconsin Supreme Court set forth the test for voluntariness:

> The test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied. See *Schneckloth*, 412 U.S. at 226, 248-49; *Rodgers*, 119 Wis.2d at 110. We make this determination after looking at the totality of the circumstances, see *Schneckloth*, 412 U.S. at 226; *Rogers*, 119 Wis.2d at 114, considering both the circumstances surrounding the consent and the characteristics of the defendant. See *Schneckloth*, 412 U.S. at 226, 229; *Xiong*, 178 Wis.2d at 534-36. No single criterion controls our decision. See *Schneckloth*, 412 U.S. at 226.
>
> *Phillips*, 218 Wis. 2d at 196-197.

The factors considered by the *Phillips* court when applying this test included: whether any misrepresentation, deception or trickery was used to entice the defendant to give consent; whether the defendant was threatened or physically intimidated; the conditions at the time the request to search was made; the defendant's response to the agents' request; the defendant's general characteristics, including age, intelligence, education, physical and emotional condition, and prior experience with the police; and whether the agents

informed the individual that consent to search could be withheld. *Phillips*, 218 Wis.2d at 198-203.

With regard to Becker's purported "consent" to search the apartment, that consent was not voluntary because (1) the police were aware of her vulnerable physical and emotional condition, since Vorburger had informed Detective Olson that Becker was a diabetic and was recovering from a D&C surgery (R70:9); (2) Becker was upset and crying during at least part of the time she was handcuffed (R58:292); (3) Becker had never been in handcuffs before and believed that she was going to be jailed (R59:258); (4) Becker was never advised of her right to decline a consent to search (R59:237); and (5) Becker was not presented with a written consent form, even though those forms were available to the officer requesting consent (R59:237).

The failure to present Becker with a consent form, when one was readily available, can be viewed as a form of deception, an unwillingness by the officer to provide any suggestion to the suspects, as a consent form would do, that they need not consent to the requested search.

Because the purported "consents" to search were not voluntary under the totality of the circumstances surrounding the arrest and confinement of Vorburger and Becker, the evidence gathered pursuant to those searches must be suppressed.

CONCLUSION

For the reasons set forth, the trial court's order denying the motions to suppress evidence was in error and the evidence seized as a result of the unlawful searches must be suppressed. Mr. Vorburger respectfully requests this court to enter an order affirming the decision and order of the court of appeals.

Respectfully submitted on August 13th, 2001.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using a proportional serif font. The length of this brief is 10,971 words.

David D. Cook

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 00-0971-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

BRADLEY J. VORBURGER,

Defendant-Appellant.

REVIEW OF DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE STEVEN D. EBERT, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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IN SUPREME COURT

Case No. 00-0971-CR

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Plaintiff-Respondent-Petitioner,

v.

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ARGUMENT

I. BY DECLINING TO CHALLENGE THE COURT OF APPEALS' DECISION AS TO THE LEGALITY OF VORBURGER'S DETENTION, THE STATE HAS NOT CONCEDED THAT BECKER'S DETENTION WAS ILLEGAL.

Vorburger argues that the state's choice to not seek review of the court of appeals' decision as to his seizure

and consent constitutes a concession that the court of appeals correctly decided the case with respect to the legality of his seizure and consent; and he argues that, because the circumstances of Amerie Becker's confinement were the same as his, the state's concession that his seizure was illegal should be viewed as a concession that Becker's continued seizure was unlawful. Brief of Defendant-Appellant at 2- 3.

The state conceded nothing by choosing to not seek review of the court of appeals' decision with regard to the legality of Vorburger's seizure and consent. As noted by the court of appeals, the search of the apartment based on Becker's consent yielded much more significant evidence than was found subsequent to Vorburger's consent to search his car. *State v. Vorburger*, 2001 WI App 43, 241 Wis. 2d 481, ¶¶ 1, 8, 9, 624 N.W.2d 398.

Because the more significant evidence was found as a result of Becker's consent to search the apartment, the state sought review of only the court of appeals' decision regarding Becker's seizure and consent.

Although the state is bound by the court of appeals' decision that Vorburger's consent to search his car was invalid, the state can seek review of the court of appeals' decision as to the legality of Becker's consent. This court's decision will provide the binding precedent as to the legality of Becker's seizure and consent under the circumstances. *State v. Lossman*, 118 Wis. 2d 526, 533, 348 N.W.2d 159 (1984); *Sukala v. Heritage Mut. Ins. Co.*, 2000 WI App 266, 240 Wis. 2d 65, ¶ 20, 622 N.W.2d 457; and *State v. Clark*, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993).

II. BECKER'S SEIZURE WAS AN INVESTIGATIVE DETENTION, NOT AN ARREST.

The state contends that Becker's seizure was an investigative detention, a *Terry* stop. Vorburger contends

that, due to the circumstances and the length of Becker's seizure, the investigative detention ripened into an arrest before she consented to the search of her apartment. He contends that the arrest was illegal because it was not supported by probable cause; and the consent was invalid because it was given while Becker was subject to the illegal arrest.

Relying primarily on *United States v. Place*, 462 U.S. 696 (1983), Vorburger argues that the length of Becker's seizure was too long to qualify as a stop. Brief of Defendant-Appellant at 17-20.

The decision in *Place* does not provide authority for concluding that the length of Becker's seizure turned the investigative detention into an arrest. As explained in *United States v. Sharpe*, 470 U.S. 675, 684-85 (1985), and in *Illinois v. McArthur*, 121 S. Ct. 946, 951 (2001), the ninety- minute period in *Place* was considered too long to be an investigative stop because the police had failed to diligently pursue their investigation. According to *Sharpe*, 470 U.S. at 686, a suspect may be detained on reasonable suspicion while the police diligently pursue a means of investigation that is likely to confirm or dispel their suspicions quickly.

In this case, Becker was detained approximately forty-five minutes from 9:20 p.m. until Detective Olson arrived with the search warrant at 10:05 p.m. (59:14-15, 18, 115). Olson's arrival with the search warrant was the culmination of a diligent pursuit by the police for the warrant to search the motel room. At about 5:20 p.m. Olson was assigned to prepare the application for the search warrant (59:103-04). To prepare the warrant application, Olson talked to Deputy Thiel, motel manager Jose Aguirre, motel clerk Kathy Strickland, Officer Chris Paulson and Sergeant Randall Gaber and Olson checked records with the Department of Transportation (59:104-05, 108, 111; Pet-Ap. 134-36). After drafting the warrant application, Olson had it reviewed by an assistant district attorney over the telephone at about 8:45 p.m.; and Olson took it to a judge to be signed at 9:34 p.m. (59:113). After

the search warrant was signed, Olson took it straight to the motel where she arrived at 10:05 p.m. (59:115).

Olson's efforts demonstrate that she was diligently pursuing the search warrant so that the police could quickly dispel their suspicions about the four persons who had been stopped as they were about to enter room 230. In conducting a thorough investigation and having the warrant application reviewed by an assistant district attorney, Olson was acting consistently with the way this court expects the police to obtain a search warrant. *See State v. Eason*, 2001 WI 98, __ Wis. 2d __, ¶¶ 3, 63, 629 N.W.2d 625 (for application of good faith exception to the exclusionary rule, the state must "show that the process used in obtaining the search warrant included a significant investigation and a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney").

Because the police diligently pursued the issuance and the execution of the search warrant, Becker's detention was not so long as to turn an investigative stop into an arrest.

McArthur establishes that the length of Becker's detention did not turn a stop into an arrest. The Court said that McArthur was not arrested and that the two hours he was restrained while the police obtained a search warrant was not unreasonable. *McArthur*, 121 S. Ct. at 950-51.

In *Sharpe*, 470 U.S. at 685-86, the Court quoted from *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981), to make the point that "'the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*.'" It is significant that the Court cited *Summers* because in that case the Court said an occupant could be detained while the police executed a search warrant for drugs. In this case, Becker was detained while the police finished securing and then executed the search warrant for drugs. Under *Sharpe* and *Summers*, therefore, the period of the

seizure was not too long to be an investigative stop or detention.

As explained at pages 18 to 23 of the state's initial brief in this court, the detention of Becker during and after the execution of the search warrant was proper to resolve the police officers' reasonable suspicions that Becker was connected to the contraband found in Room 230.

The circumstances also failed to turn Becker's seizure into an arrest.

Relying on *State v. Wilson*, 229 Wis. 2d 256, 267, 600 N.W.2d 14 (Ct. App. 1999), Vorburger argues that Becker was arrested because the police would not let her go to the bathroom alone. In that case, a police officer, who suspected Wilson of drug use, twice refused Wilson's request to go to the bathroom unless Wilson first permitted the officer to search him. *Id.* The court said that the degree of restraint the officer exercised over Wilson constituted an arrest. *Id.*

In this case, Officer Linda Kosovac told Becker she would accompany Becker to the bathroom; but Becker could not go alone (59:189, 225). Kosovac denied that she told Becker that the handcuffs would have to remain on Becker while she went to the bathroom (59:225).

For several reasons, *Wilson* does not require a finding that Becker was under arrest just because the police would not permit her to go to the bathroom unattended. Unlike the facts in *Wilson*, the police in this case did not refuse to permit Becker to go to the bathroom. Rather, the police told her that she would have to be accompanied by a police officer. In *Evans v. Rogerson*, 223 F.3d 869 (8th Cir. 2000), the court said that the Iowa Supreme Court had not unreasonably applied federal law when it decided that the suspect was not in custody in his home when the police ordered the suspect to leave the door open while he used the bathroom so that the police could observe him. *Evans*, 223 F.3d at 870. Under *Evans*, Becker would not have been arrested just

because Kosovac would have been present when Becker went to the bathroom.

Other cases have held that a suspect was only stopped and not arrested when the police refused to let him go to the bathroom. *United States v. Baptist*, 556 F. Supp. 284, 286-87 (S.D.N.Y. 1982); and *State v. Rocha-Ramos*, 985 P.2d 217, 219, 221 (Or. Ct. App. 1999). This holding is consistent with the authority the police have during a stop. In *State v. Goyer*, 157 Wis. 2d 532, 537-38, 460 N.W.2d 424 (Ct. App. 1990), the court held that a suspect does not have the right to walk away from an investigative stop.

In *McArthur*, 121 S. Ct. at 950-51, the Court said that it was reasonable for the police during a two-hour stop to prevent McArthur from entering his home unaccompanied by an officer. Just as the two-hour restraint in McArthur was reasonable during a stop, it was reasonable for the police to tell Becker that Kosovac had to accompany her to the bathroom. The requirement did not turn the stop into an arrest.

Vorburger argues that Becker's seizure was an arrest because she was handcuffed. Brief of Defendant-Appellant at 14-17.

The cases cited by Vorburger recognize that the use of handcuffs does not automatically convert an investigatory detention into an arrest; and the question is whether the use of the handcuffs was unreasonable under the circumstances. *See, e.g., United States v. Acosta-Colon*, 157 F.3d 9, 18, 21 (1st Cir. 1998); *Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996); *Baker v. Monroe Tp.*, 50 F.3d 1186, 1193 (3rd Cir. 1995); *United States v. Tilmon*, 19 F.3d 1221, 1228 (7th Cir. 1994); *United States v. Sanders*, 994 F.2d 200, 206, 208 (5th Cir. 1993); *United States v. Jones*, 973 F.2d 928, 931 (D.C. Cir. 1992); *United States v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983); *Reynolds v. State*, 592 So. 2d 1082, 1085 (Fla. 1992); and *State v. Buti*, 964 P.2d 660, 663 (Idaho 1998).

In the circumstances of this case, the use of the handcuffs was not unreasonable for the reasons set forth at pages 24-26 of the state's initial brief. One of the cases cited by Vorburger refers to an incident that demonstrates why it is reasonable to handcuff a suspect even after the suspect has been frisked. In *Sanders*, 994 F.2d at 210 n.60, the court noted a case in Indiana where a police officer "arrested, handcuffed, and searched a DWI suspect, but apparently failed to find a .25 caliber pistol that the suspect was carrying." While being transported to the jail, the suspect retrieved the gun and killed the officer. *Id.* The incident shows that frisks are not always successful in finding all weapons.

The cases cited by Vorburger are consistent with the rule stated in *Sharpe*, 470 U.S. at 686-87, that the courts should not second-guess the conduct of the police; and the courts should only determine whether the police acted unreasonably and not examine whether some other alternative was available.

In *McArthur*, 121 S. Ct. at 950-51, the Court found that the two-hour restraint of the defendant while the police obtained a search warrant was reasonable because of four factors: the police had probable cause to believe that the residence contained unlawful drugs; the police had reason to believe that McArthur would destroy the drugs if he were not restrained; the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy; and the two-hour period of restraint was a "limited period of time."

A similar set of factors demonstrate that the police acted reasonably in this case. The period of time from when Becker was stopped until she consented to the search of her apartment was less than the two hours it took to obtain the warrant in *McArthur*. Based on the sample Aguirre removed from room 230, the police had probable cause to believe the room contained marijuana. The police had good reason to believe that Vorburger, Becker and Cramer would leave the area if they were not restrained since there was no reason for them to remain

near a motel room if their freedom was not limited. The concern for officer safety and the safety of other motel guests also justified the restraints placed on the three. Finally, in restraining the three but not removing them from the area, the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy.

As in *McArthur*, the actions taken by the police were not unreasonable; and, therefore, the police acted in compliance with the Fourth Amendment.

In arguing that Becker was arrested, Vorburger points out that she was told she was not free to leave. Brief of Defendant-Appellant at 7-8.

The fact Becker was not free to leave was just as consistent with an investigative detention as it was with an arrest. *See Goyer*, 157 Wis. 2d at 537-38. In addition, the police told her repeatedly that she was not under arrest. (58:290-91; 59:21-22, 76-77, 250). Vorburger argues that, despite the advice to Becker that she was not under arrest, the police believed that Vorburger, Becker and Cramer were under arrest, as evidenced by Detective Olson's report that says the three were taken into custody. Brief of Defendant-Appellant at 9-10.

The state's response is twofold. First, Olson explained that, although she said in the report that the three were in custody, she knew they were not under arrest (59:180). Second, even if the police thought the three were arrested, the unarticulated plan of the police is irrelevant to determining the question of custody. *State v. Swanson*, 164 Wis. 2d 437, 447 475 N.W.2d 148 (1991). *See also Whren v. United States*, 517 U.S. 806, 813 (1996).

As discussed in the state's initial brief and as supported in this brief, a reasonable innocent person in Becker's position would have believed she was subject to a temporary investigatory stop, not that she was arrested.

Therefore, under the objective test, the police action was justified; and, Becker's detention and consent were valid.

III. THE DETENTION OF BECKER WAS JUSTIFIED UNDER *MICHIGAN V. SUMMERS*.

Vorburger denies that in his response to the petition for review he conceded that his and Becker's detention during the obtaining and execution of the search warrant was lawful. Brief of Defendant-Appellant at 34.

In the Response to Petition for Review at page 5, Vorburger stated that he had not argued that the initial stop was unlawful and that "there is no need for this court to review *whether the initial stop of the non-occupants was lawful because that issue has never been contested*" (emphasis added.)

In stating that the initial stop had never been contested, Vorburger concedes that it is not an issue in the case even if he does not admit it was lawful.

Vorburger argues that his and Becker's detention was not justified by the holding in *Michigan v. Summers* because they were not occupants of room 230. Brief of Defendant-Appellant at 33-37.

In *Summers*, 452 U.S. at 705, the Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted" (footnotes omitted).

Regardless of the holding in *Summers*, the detention of Becker was valid because, for the reasons stated at pages 20 to 22 of the state's initial brief, the police had reasonable suspicion that Becker had committed or was about to commit a crime when she came to room 230 with Cramer.

Summers provides additional support for detaining Becker and Vorburger. When stopped, Becker and Vorburger were about to enter room 230 with Cramer. Cases have concluded that the holding in *Summers* applies to persons found in a residence to be searched even if they did not reside there. *United States v. Fountain*, 2 F.3d 656, 663 (6th Cir. 1993) (the concerns justifying the detention of the occupants in *Summers* are the same whether the individuals present in the home being searched are residents or visitors); *United States v. Pace*, 898 F.2d 1218, 1239 (7th Cir. 1990) (as in *Summers*, the connection of the two visitors to the condominium gave the officers an easily identifiable and certain basis for detaining them during the search); *Taylor*, 716 F.2d at 707 (Supreme Court framed *Summers* in terms of occupants, not owners.); *In re Andre W.*, 590 N.W.2d 827, 830 (Neb. 1999); and *State v. Phipps*, 528 N.W.2d 665 (Iowa Ct. App. 1995) (court is persuaded that cases applying *Summers* to nonresident visitors are correct).

Since Cramer was about to admit Vorburger and Becker to his room that contained the marijuana, the holding in *Summers* justified their detention.

IV. BECKER VOLUNTARILY CONSENTED TO THE SEARCH OF HER APARTMENT.

The state relies on the arguments made at pages 31-34 of its initial brief to support the contention that Becker voluntarily consented to the search of the apartment she shared with Vorburger.

The state wishes to provide a record citation for a statement made in its initial brief. The state at page 33 said Becker described two times when she cried: when she talked to Linsmeier and when cocaine was found at her apartment. The record citation to support that statement is 59:281-82.

CONCLUSION

For the reasons discussed above and in its initial brief, the State of Wisconsin requests that this court reverse the court of appeals' decision that reversed the judgment of conviction.. The state requests the court to affirm the judgment of conviction pursuant to *State v. Armstrong*, 223 Wis. 2d 331, 367-72, 588 N.W.2d 606, *on motion for rehearing*, 225 Wis. 2d 121, 591 N.W.2d 604 (1999).

Dated this 17th day of September, 2001.

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 2,981 words.

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